PROCEDURE IN THE UNITED STATES COURTS

HEARING

BEFORE A

JOINT MEETING OF SUBCOMMITTEES

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

SIXTY-SECOND CONGRESS

ON

BILLS S. 3749 AND S. 3750

BOTH INTRODUCED BY SENATOR NELSON (BY REQUEST)
DECEMBER 13, 1911

AND

S. 4029

INTRODUCED BY SENATOR ROOT DECEMBER 27, 1911

ALL RELATING TO PROCEDURE IN THE
UNITED STATES COURTS

JANUARY 25, 1912

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SUBCOMMITTEE ON S. 3749 AND S. 3750

SENATORS ROOT, BROWN, AND CULBERSON

SUBCOMMITTEE ON S. 4029

SENATORS ROOT, BORAH, AND RAYNER

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PROCEDURE IN THE UNITED STATES COURTS.

JANUARY 25, 1912.

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D. C.

The subcommittees met in joint session at 3 p. m.

Present: Senators Root (chairman of both subcommittees), Borah, and Culberson.

Also present: Representing the American Bar Association, Everett P. Wheeler, Esq., of the New York bar; Russell Whitman, Esq., of the Chicago bar; and R. E. L. Saner, Esq., of the bar of Dallas, Tex.

Senator ROOT (chairman). There are gentlemen present representing the American Bar Association who desire to be heard on three bills pending before the Judiciary Committee. Two of the bills are in the hands of a subcommittee of which Senator Culberson and I are members, and one of them is in the hands of a subcommittee of which Senator Borah and I are members. Senator Rayner has stated to me that we may vote him in favor of Senate bill 4029. If you have no objection, Senator Culberson, we will let these gentlemen take that bill up first.

Senator CULBERSON. I have no objection if that is agreeable to these gentlemen who are here.

The bill (S. 4029) is as follows:

[S. 4029, Sixty-second Congress, second session. In the Senate of the United States. December 21, 1911. Mr. Root introduced the following bill; which was read twice and referred to the Committee on the Judiciary.]

A BILL To amend chapter 11 of the Judicial Code.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter eleven of the Judicial Code, entitled "Provisions common to more than one court," shall be amended by adding at the end thereof new sections, to be known as sections two hundred and seventy-four A and two hundred and seventy-four B, to read as follows:

"SEC. 274 A. In case any of said courts shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form.

"SEC. 274 B. In all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had a bill embodying the defense or seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal, the appellate court shall have full power to render such judgment upon the record as law and justice shall require."

Senator ROOT. The two sections which it is proposed by this bill to add to the present law are designed to prevent the miscarriage of justice which sometimes occurs by reason of the fact that people get into court on the equity side when they ought to be on the law side or vice versa; and to authorize equitable defenses in common-law actions. Mr. Wheeler, we should be very glad to hear anything on that.

STATEMENT OF EVERETT P. WHEELER, ESQ., OF NEW YORK.

Mr. WHEELER. Senators, it gives me pleasure to say a few words on behalf of these amendments. Our experience has shown us, as members of the American Bar Association, practicing in the Federal courts, that there is sometimes a miscarriage of justice by reason of a mistake in the beginning of a suit. It seems a very simple thing whether you shall write the words "at law" at the top of the first page of your declaration, if it be a declaration, or "in equity" on your bill, or "in admiralty" on your libel.

All that is required in Federal courts to put the case in the one branch or the other is to say "At law" or "In equity" or "In admiralty"; and yet we do sometimes find that if there is a mistake in that, and the lawyer gets the wrong word in, it is very serious in its result under the present practice. Usually the suit must be dismissed, and you must begin all over again. Sometimes the statute of limitations runs before you can begin the new suit. At any rate, there is great delay and additional expense.

There seems to be no reason why in such a case you should not be allowed to amend at once.

Then, again, in many of the States, where the practice has been revised, there is a convenient and simple method by which when an action, for example, is brought at law, and there is an equitable defense, you can set that up in the same suit. You bring, for example, an action on a contract, a policy of insurance, if you please, and the defendant claims that there has been a mistake in drawing it. Under the Federal practice you have to file a separate bill in equity, get your injunction against the proceedings at law, and try that out, delaying thereby the progress of the suit; but in many of the States the legislature has provided that in such a case as that you can set up your equitable defense by way of answer, and then the whole matter is tried at once. The court may order issues to be tried by jury if they think proper.

I tried a case of that sort last March, where there was an equitable defense set up on an action on a promissory note. The court ordered it tried before a jury. The whole thing was disposed of, whereas if it had been necessary to bring a separate suit there would have been at least a year's delay and possibly more. To some extent the testimony was the same in both. Under the system in the Federal courts you would have had double expense, double delay, and double inconvenience.

Now, inasmuch as the real object of a lawsuit is to get at the merits of the case and to promote the attainment of justice, it does seem as if the procedure ought to be as simple as possible, directed to that end, and so we trust that it may meet the views of the committee to report this bill favorably. The bill has been carefully drawn by a large committee of the American Bar Association. It was considered

at the meeting of the association last August and unanimously recommended to Congress.

The only point, so far as I know, that has ever been made against it is that there is intrinsic difficulty caused by the Constitution of the United States. That does provide undoubtedly, as we point out in our report, that courts of the United States shall have jurisdiction of cases "at law and in equity"; but there is nothing said about how the legal rights or the equitable rights shall be enforced. The judiciary act of 1789 provided that the same court held by the same individual should have jurisdiction at law and in equity and in admiralty. The judge, in the same array and with the same surroundings, the same clerk, and the same marshal and on the same bench, hears an equity case and an admiralty case and a law case. The dividing line between law and equity is shadowy. What possible objection can there be to providing that when the judge is sitting in the law branch of the court hearing a case at law, and it appears that the remedy is in equity, he may direct the complainant to amend his declaration, or whatever it is called—it is called a complaint in New York, and in some States it is called a petition, but the name is immaterial—to amend so as to ask for the suitable equitable relief and then go on and administer it on proofs. Vice versa, if the court is sitting in equity, he should be able to require the parties to amend if he finds that the remedy sought should be at law. We submit that there is nothing in that which blots out the distinction between law and equity. In some cases it is clear and there never could be any question; but there are cases on the borderland, where it is not so easy to say whether your relief should be in law or equity; and if a lawyer makes a mistake, why should his client suffer?

Senator CULBERSON. I am not a member of this particular subcommittee, but I am a member of the Committee on the Judiciary, and it occurs to me to ask you whether this matter is proposed to be dealt with by the new rules that are under consideration by the Supreme Court.

Mr. WHEELER. To some extent it can be dealt with by the new rules.

Senator CULBERSON. Do you know whether it is contemplated to deal with this question by the new rules?

Mr. WHEELER. I am informed that it would be very agreeable to the court to have this subject dealt with by Congress so as to cover the whole ground. What the rules could do would be this: The rules could say that if a bill is filed on the equity side of the court, and under the present practice you would be required to file a cross bill, you could get the same relief on answer that you can now on a cross bill. But under the present statutes the Congress has provided that in all cases at law the practice shall be similar to that in the State courts, and it has not given to the Supreme Court the power to make rules regulating the proceedings in actions at law, so that if an action were brought at law and the court should be of opinion that it ought to have been brought on the equity side the Supreme Court could not provide by rule this change which we are now empowering it to provide. They have no power to do that. Neither have they power to provide that an equitable defense should be set up in an action at law. That is within the jurisdiction of Congress.

I have been in conference with their secretary and in correspondence with some of the members of the court in regard to the amendments to the rules and recommendations made by the bar in different circuits. While I am not at liberty to quote individuals, I think I am authorized to say that it would be agreeable to the court if Congress should deal with the subject so as to enlarge the power of the court to deal with this class of cases, so that the modification, as it were, of the equity rules might provide for the details of the relief which in general is given in this act.

If you should pass this bill, for example, and it should be approved by the President, there would have to be rules made, either in the circuits or by the Supreme Court, to provide the method for carrying out the object of the bill. The bill was drawn in general terms. The court could not by any amendment to the equity rules under the existing statute do what is here proposed.

Senator ROOT. Do the other members of the committee representing the Bar Association wish to be heard on this matter?

STATEMENT OF RUSSELL WHITMAN, ESQ., OF CHICAGO, ILL.

Mr. WHITMAN. I might refer to another objection which has come up and might perhaps be urged, a rather insidious and dangerous objection, to this effect: That this mixing up of law and equity, as it is called in the brief of the objectors in their discussion of the matter, is really sweeping away the old land marks with which we are all familiar. The common law has established forms, and we know what they mean; and equity is established, and we know what it means. And then the suggestion is made that this honorable body and other honorable bodies seek to kindly draw the curtain of oblivion over mistakes of attorneys. The gentlemen who assert and maintain these objections always assume that in the case of a competent attorney—I modestly refrain from mentioning them—but in the case of a competent attorney this would be entirely superfluous, and it is only to correct the mistakes of incompetent attorneys who do not know the difference between law and equity.

Senator BORAH. That would only apply to the first section?

Mr. WHITMAN. Yes; that is what I was speaking to.

Senator ROOT. Is not this a fact that in many parts of the country there are a great many very competent attorneys—indeed, in all parts of the country many competent attorneys—whose practice is chiefly under the code procedure of the State courts and who are therefore not very familiar with the old equity practice and who are liable to make mistakes for which their clients may suffer?

Mr. WHITMAN. Yes, sir. You anticipate and make it unnecessary for me to state that which I was going to state, but I may add to the Senator's suggestion this: We work hard in Illinois. We have the old equity and the old common law, except a few modifications. But, Senators, I give you my word that, work as hard as we may, there are some cases, along in this No Man's Land that has been referred to—fraud cases and matters of that kind—where we can not always tell in advance whether we should be on the law side or the equity side, and it is that kind of thing—that produces expense and brings satisfaction to no one—that we hope an act like this could avoid.

Hard-working, high-minded lawyers may try their best to find out which side of the court they should be on, and if they happen to guess wrong, perhaps the statute of limitations has run against them and out they go, and there is an injustice done. What we want to do is to try to take care of the honest class of lawyers, for what clients have to pay, and if in spite of all their care and pains these lawyers go wrong once in a while we should not bother ourselves if also the proposed legislation might in some instances be to the disadvantage of the dishonest or incompetent lawyer.

Senator CULBERSON. Does this assimilate Federal practice to that in the code States?

Mr. WHITMAN. No; it simply does this: For instance, in Illinois, we go into the law side of a Federal court in a lawsuit on a promissory note; but in those cases, which are hard to tell, if we find our pleadings are wrong, they may be made to conform to the appropriate side of the court. That, I think, answers your question.

Senator ROOT. Mr. Saner, do you wish to say anything?

Mr. SANER. No, sir. I thank you, I do not think I do.

Senator ROOT. The hearing on this bill, then, will be considered closed.

However, here is a letter from Mr. Charles J. Faulkner, written to Senator Clark of Wyoming, saying that he would like to appear before the committee. I will send word to him that we will hear anything that he has to say and will suspend final action until we hear from him.

Mr. Faulkner, in lieu of an oral address, submitted the following to be incorporated in the record of the hearing:

[Copy of brief filed with the Committee on the Judiciary of the House of Representatives.]

In the matter of allowing and regulating amendments in judicial proceedings in the courts of the United States:

The bill H. R. 12365 is in two sections. The first section regulates the law and equity practice and is as follows:

"That in any suit in equity instituted in the courts of the United States wherein it shall be decided prior to final decree that the complainant has a complete and adequate remedy at law the complainant may, at his election, upon such terms as the court may impose, cause the same to be transferred to the law docket of the court, there to be proceeded with as if originally instituted as a suit at law."

In less drastic form this is somewhat the sole alteration which is proposed to be made by the bill known as S. 4029, which proposes to add to chapter 11 of the Judicial Code two new sections as follows:

"SEC. 274 A. In case any of said courts shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form.

"SEC. 274 B. In all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had a bill embodying the defense or seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal, the appellate court shall have full power to render such judgment upon the record as law and justice shall require."

This last quoted bill is the one which a special committee of the American Bar Association reported favorably as a bill "To prevent delay and unnecessary cost of

litigation." (See report presented at the meeting at Boston, Mass., Aug. 29, 1911, pp. 14–16, and for the bill, pp. 23–24.) The report of the committee justifies the bill by the argument (p. 15):

"If the pleader by mistake has put the words 'at law' in his pleading when he should have put the words 'in equity' or 'in admiralty,' it should be the duty of the judge to make the amendment on the spot."

Again, speaking of the code system, at page 16 the report says:

"Notwithstanding these alarming judicial statements legal and equitable remedies continue to be administered under the codes; legal principles and equitable principles continue to be observed. Many think that they are more conveniently administered and observed under an approximately uniform procedure than they were in those days when a mistake in the choice of a proceeding threw the plaintiff out of court, even if it did not finally defeat his right."

If the bills accomplish no more than to permit transfer from the law to the equity side in such a case as that suggested by the committee's report where there was merely a clerical error in naming the writ, declaration, or other pleading, the bill would be unnecessary, for this could readily be accomplished, as the committee points out at page 17, by a rule of the Supreme Court in equity; and surely Congress ought not to be troubled to pass an act as to a matter which can and should be covered by a rule of court.

But the bills—and particularly S. 4029—run far beyond curing a mere clerical error of description. The proposed section 274 A provides that in case a court shall find that a suit at law should have been brought in equity or the reverse "the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice."

Proceedings at law or in equity are essentially different in origin, nature, and object. The two New York cases (Leroy *v.* Marshall, 8 How. Pr., 373, and Railroad *v.* Schuyler, 17 N. Y., 592) cited on pages 15 and 16 of the report of the special committee of the American Bar Association are correct. The equitable proceedings were devised to cover those cases wherein for some reason a court of law could not administer justice. Hence there is a difference in the essentials of pleading which must ever be maintained. We do not understand that the advocates of these bills dispute this. Yet they urge that the courts shall be directed to do an impossibility, namely, order an amendment to pleadings at law to convert them into pleadings in equity or the reverse, when, in point of fact, neither is germane to the other. An attempt to abolish distinctions so fundamental between these great fields of jurisprudence by an act so indefinite in its terms and summary in its language can only cause years of confusion in practice. Even to attempt to criticize the bill is to realize the impossibility of foreseeing its effects in practice. It is not unfair to say that one of its effects will be to impose upon the court the duty of amending and curing the careless work of the incompetent pleader.

If the bill S. 4029 should pass what would be the result? Instead of well-understood precedents and forms well known and easy to handle by any competent lawyer we shall momentarily have a complete breakdown of the distinctions and slowly the formation, at the expense of litigation to acquire precedents, of an entirely new system, based, however, upon the same general principles because those principles are changeless and have been evolved out of experience.

After all, such legislation is at best contrived to protect the few careless or incompetent practitioners from the consequences of their fault. Distinctions and forms, valuable in arriving at and effectually administering justice either at law or in equity, are to be sacrificed in order to save the few blunderers. The same argument, pushed to what was once well described by Mr. Justice Holmes as a dryly logical conclusion, would require the repeal of statutes of limitation because in their operation they foreclose just claims carelessly asserted or neglected. The idea of such legislation seems to be a hasty generalization from the few cases wherein injustice seems to have been done and the sacrifice of matters which are of value to save those few persons from the consequences of their own fault.

As to codes, we venture the assertion that lawyers who have had the opportunity of observing court procedure in code States and in States where the common-law procedure obtains have usually reached the conclusion that the code proceedings, instead of simplifying litigation, have created the necessity for a reconstruction of the very same controlling principles for the reasons already stated—that they are changeless and inhere in the subject. In Pennsylvania the practice act of 1887 was intended to simplify pleading and practice, but, as one of the great judges of Pennsylvania afterwards said, did no more than substitute for the orderly narratione or declaration the telling of the story as one old apple woman would tell it to another. And, at last, the courts in Pennsylvania had to come back to the common-law principles.

Thus in Emmens *v.* Gebhart (7 Pa. County Court Rep., 522 (1890)), Schuyler, P. J., said at page 525:

"Only the forms of special pleading have been abolished; its substance remains and must ever remain."

And in Fritz *v.* Hathaway (135 Pa., 274 (1890)), Mitchell, J., said at page 280:

"The act is unwise, and is founded on the erroneous and superficial view that, by abolishing technical forms, it can get rid of distinctions inherent in the nature of the subject, but it would be doing injustice to the purpose of its framers to hold that it was meant to sanction mere looseness of pleading. Accuracy and technical precision have no terrors except for the careless and the incompetent, and the act of 1887 was not intended to do away with them. As to all matters of substance—completeness, accuracy, and precision are as necessary now to a statement as they were before to a declaration in the settled and time-honored forms."

To some lawyers and to most laymen it appears as though the distinctions between law and equity and many other actions of apparently formal pleading are mere technicalities. But nearly all of the so-called technicalities of which laymen complain and many of those of which some lawyers complain are really essentials in the orderly and right administration of justice. The decision of the supreme judicial court of Massachusetts in the case which changed William Cullen Bryant from an indifferent lawyer into a fair poet is of interest in this connection, though the case did cause Bryant to leave the bar and take up a literary career. That case is Bloss *v.* Tobey (2 Pick., 320 (1824)), and was an action of slander. The declaration in the first count charged that the defendant did falsely and maliciously say of the plaintiff "There is no doubt in my mind that he" (plaintiff) "burnt it" (his store) "himself." And in the second count the same phrase coupled with the further phrase: "He" (plaintiff) "would not have got his goods insured if he had not meant to burn it" (the store).

For lack of a colloquium showing that an illegal act was charged in the alleged slander, and showing the circumstances under which the words were spoken, this pleading was held bad after verdict, and properly so; for if any other rule had been announced the result would have been to allow recovery to that particular plaintiff, but a safeguard of litigation would have been lost, namely, the safeguard that all the essential circumstances of the cause of action shall be shown in the declaration, in order to warn the defendant of the cause of action he will be called upon to meet and enable him to prepare his case, summon the necessary and proper witnesses, etc.

The courts of the United States are already empowered to take care of the subject matter of the proposed bills in so far as the orderly and proper administration of justice requires or permits. (See Schurmeier et al. *v.* Connecticut Mutual Life Ins. Co., 171 Fed., 1, and the report of the American Bar Association's special committee, at p. 17.) The passage of any bill on the subject is unnecessary and unwise, and some of the bills suggested would be mischievous.

Respectfully submitted.

JOSEPH I. DORAN,
[*General Counsel Norfolk & Western R. R.*]
THEODORE W. REATH,
[*General Solicitor Norfolk & Western R. R.*]

JANUARY, 1912.

Senator ROOT. The two bills which are before the subcommittee, of which Senator Culberson, Senator Brown, and myself are members, are the bills S. 3749 and S. 3750. We will first take up 3750, which provides that no judgment shall be set aside or reversed or new trial granted by any court of the United States in any case, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence, and so forth, unless, in the opinion of the court to which the application is made, substantial rights are affected.

The bill is as follows:

[S. 3750, Sixty-second Congress, second session. In the Senate of the United States. December 13, 1911. Mr. Nelson (by request) introduced the following bill; which was read twice and referred to the Committee on the Judiciary.]

A BILL Relating to procedure in United States courts.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no judgment shall be set aside or reversed or new trial granted by any court of the United States in any case, civil or criminal, on the ground

of misdirection of the jury or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless, in the opinion of the court to which application is made, after an examination of the entire cause, it shall appear that the error complained of has injuriously affected the substantial rights of the parties. The trial judge may in any case submit to the jury the issues of fact arising upon the pleadings, reserving any question of law arising in the case for subsequent argument and decision, and he and any court to which the case shall thereafter be taken on writ of error shall have the power to direct judgment to be entered either upon the verdict or upon the point reserved, if conclusive, as its judgment upon such point reserved may require.

STATEMENT OF EVERETT P. WHEELER, ESQ., OF NEW YORK.

Mr. WHEELER. Senators, it is with pleasure that I appear in support of this bill. It has been before previous Congresses, and has been amended to meet the views that were expressed in committee. This is, I think, the third Congress at which it has been under advisement, and the American Bar Association has had it under consideration now for five years. So I may say that in its present form it has had very careful consideration both in Congress and out of it. It did pass the House of Representatives in the last Congress but failed to come up in the Senate. So it never has been brought to a vote here.

Senator CULBERSON. In this exact form, you mean?

Mr. WHEELER. In this exact form it passed the House, yes. The bill as it was before the Judiciary Committee in the last Congress was more extensive in scope. It covered to some extent some points that have been embodied in the judicial code. That is to say, one of the points included in that was in reference to appeals in capital cases, which formerly, as you know, were taken direct by writ of error to the Supreme Court. Under the judicial code they are now to be taken to the circuit court of appeals with a possible right of review by the Supreme Court on certiorari. That is out of the present bill.

Then, again, the phrase used in the bill as originally drawn was "and unless it should appear that the error complained of has produced a miscarriage of justice." We took that from the English rules, but the criticism was made of that in the subcommittee of the Senate, and in the Judiciary Committee of the House, that that phrase while it might be well understood in England, had not gotten an exact foothold in this country, and so it was thought it would be more clear, to use the phrase which has now been embodied in the bill, "injuriously affected the substantial rights of the parties."

Senator ROOT. This is a much milder expression, is it not?

Mr. WHEELER. Yes, sir.

Senator ROOT. Milder than "miscarriage of justice"?

Mr. WHEELER. Yes. The real object of the bill is twofold. First, to provide that any technical errors, defects that may exist in any of the rulings or in the pleadings themselves, which do not injuriously affect the substantial rights of the parties shall be disregarded. Then it is further provided, in order to make the practice in the Federal courts uniform in the different circuits in that respect, that it shall be competent for the judge trying a case before a jury to submit questions of fact to the jury, reserving his decision on questions of law.

The two provisions of the act go together. Now, it is true that in some States—I know in New York, and I am told it is true in Massachusetts and Connecticut, New Jersey and Pennsylvania—that prac-

tice now exists. On the other hand, my friend, Mr. Whitman, tells me that it does not exist in Illinois, and I am sure that in many circuits that is not the practice.

You will remember that the Federal courts in common-law cases are required by statute to follow the practice in their State courts, and unless the State practice, either by code or otherwise, gives this right the courts of the United States do not have it.

Now, then, you see how the thing would practically work in the trial of an important case. The judge would see that there were questions of fact involved. It might be the ascertainment of damages. It might be some other issue; but whatever it would be he could take a verdict, have that entered on the record, and reserve his decision on the questions of law arising upon that finding. Then, suppose, for example, he came to the conclusion that judgment must be ordered for the plaintiff upon the verdict; it would be competent for the court of appeals to look into the whole record and to say upon that record, upon the finding of the jury, that the defendant is entitled to judgment.

And then under this act as we have drawn it, in such a case as that, the court, instead of ordering a new trial and having the facts tried over again in order to render a judgment for the defendant, could render judgment at once. Then carry it a step further. In such a case as that, if the Supreme Court should grant a certiorari and the record should be taken there, they would have the same power that this confers upon the circuit court of appeals. So, in short, the thought underlying the bill is that in every stage of the cause the court shall have the whole record before it and shall give judgment upon the merits of the case without regard to any technical defects that do not affect the merits.

In a brief which we are going to ask the committee to receive in support of this bill—and I will hand up copies now, and shall I leave with the clerk copies for the other members?

Senator ROOT. Yes; I wish you would.

Mr. WHEELER. We will do so with pleasure. We point out some of the cases, some in Federal courts and some in the State courts, where under the present system, which deals with these questions as purely matters of error and not upon the whole record, the court feels bound to look at even trivial and very unimportant errors, and if they find an error they say, "We must in order to support this judgment declare that there has been no error in anything." The old English phrase was "In nullo est erratum." Unless they can do that they feel compelled to reverse. In many courts the suggestion has been made that that is a great misfortune, and yet the judges feel bound to do it. We had in New York a legislative commission to examine into the subject of the law's delay and the causes of it, and some of our judges were examined. We quote in the brief from what they say. One of them is now a Senator and a member of this committee, Senator O'Gorman. He points that out very clearly:

> One of the gravest faults with our present mode of trial is the ease and frequency with which judgments are reversed on technicalities which do not affect the merits of the case, and which at no stage of the case have affected the merits.

Then, we have tried the other plan in the State of New York. Curiously enough in criminal cases, we have given to the appellate court far greater rights to deal with cases on the merits and to over-

look technical errors than in civil cases. On page 4 of the brief we quote from the opinion of the court of appeals in the case of People *v.* Strollo.

That, of course, is quite in opposition to the old theory that any error in a criminal case can be taken advantage of for the benefit of the criminal. The courts and the legislature have come to recognize that society has an interest in punishing a guilty man. We should acquit an innocent man, of course, but the guilty should not escape. However, the criminal laws were once cruel—the punishment of death, for example, having been given, I think, for stealing 30 shillings in England—and that severity of the law led the judges to do everything they could to mitigate. But now we have abolished all those cruel statutes, and, we may add, cruel methods—because, as you know, originally a defendant in a criminal case had no counsel. The old English law was certainly most oppressive to a defendant in a criminal case. That we have changed. A man must first be found guilty prima facie by a grand jury and then is tried by a petit jury, and they must find him guilty beyond a reasonable doubt and by a unanimous verdict. Yet until the amendments which have been made in some of the States the court on appeal, although convinced of his guilt, felt bound to grant him a new trial. That has been so in criminal cases in New York, in Missouri, and in many other States. In many this technical practice has been reformed. What we are trying to get Congress to do is to make that change for the Federal courts.

Senator CULBERSON. Mr. Wheeler, I do not understand exactly the wording in line 11: "The trial judge may in any case submit to the jury the issues of fact," etc. Of course, if that passes it will regulate the trial of facts, in all trial courts, in the United States courts.

Mr. WHEELER. Yes, precisely.

Senator CULBERSON. Is that meant to leave it entirely with the judge as to whether a man shall have a trial by jury on the facts of his case?

Mr. WHEELER. No, not at all; but it leaves it open to him, even although his impression at the time is in favor of the points of law raised by the defendant to take a verdict on the facts, and reserve the decision on the law.

Senator ROOT. This does not apply to anything but jury trials, does it?

Mr. WHEELER. No.

Senator CULBERSON. I think it may apply to any but a jury trial, because it seems to leave it to the discretion of the court whether it may submit any questions of fact, in the case of appeal, to a jury.

Senator ROOT. Would this not cover it: "The trial judge may in any case tried before a jury submit to the jury the issues of fact arising upon the pleadings"?

Senator CULBERSON. That would leave it to his discretion, then. Of course, the sole object of the jury is to pass upon the facts on the pleadings, under the instructions of the court as to the law applicable. But I want to have this cleared up; this may leave it entirely discretionary with the court, the parties having nothing to do with whether there shall be a jury trial.

Mr. WHEELER. No; I do not think you could give it that construction.

Senator CULBERSON. It says "may in any case." It does not limit it to jury cases. It leaves it discretionary. Of course, if a court is trying a nonjury case and desires to submit a question of fact to the jury, this would apply.

Mr. WHEELER. Well, it is not intended to apply to that class of cases.

Senator CULBERSON. And apparently, to my mind, it ought not to apply to any other character of cases; because if it did the parties would be denied their right to trial by jury.

Mr. WHEELER. The parties, under the Constitution, if there is a question of fact, have the right to have it submitted to the jury, unless the judge on the trial is of opinion that there is some legal point that is fatal. The object of this statute is to enable the judge in such a case to reserve his decision on a point of law. Take, for example, a couple of cases that are found in 161 New York, 123,139. Two actions there were actions against the city of New York for negligence. Notice of the nature of the accident and its time and place was required by statute. In the two cases referred to the point was made on the trial that the notice was insufficient. In the first case (Missano *v.* The Mayor) the judge held it sufficient. In the second case (Sheehy *v.* The Mayor) he held it insufficient and dismissed the complaint. The court of appeals, to whom an appeal was taken, were of a different opinion, and held the notice sufficient. But they were obliged to send the case back to a new trial and put the plaintiff to the expense and delay of a new trial, although he had been in court once with his witnesses, simply because of the error on that point of law.

In the other case a verdict had been taken. The appellate court, of first instance—appellate division, as we call it in New York—held the notice insufficient and dismissed the suit, but the court of appeals reinstated the verdict holding that the notice was sufficient.

The difference was simply this: The question involved was the same; but by one method of procedure, a verdict was taken, and the plaintiff was enabled to get his verdict on record and hold it if the final court thought it right. In the other case, having put in all his testimony he was dismissed, and yet the court of final resort held him to be right on the law, and for no fault of his own he was sent back to another trial.

The purport of this section is to obviate such delay. There is no objection of course to any amendment which you may make that will have this effect. Mr. Root has suggested one which would be perfectly satisfactory: "May in any case tried by a jury submit to the jury the issues of fact arising under the pleadings."

Senator CULBERSON. That would be tautology. Of course the jury trial is to try the facts. Ought it not to be in nonjury trials?

Mr. WHEELER. No; it does not affect that. The present power of a court of equity to order issues to be tried by jury is sufficient. So I do not think it is necessary to make any change there.

Senator CULBERSON. This does not apply to that.

Mr. WHEELER. No; this applies to common law cases.

Senator CULBERSON. In civil or criminal cases?

Mr. WHEELER. In both.

Mr. WHITMAN. May I make a suggestion directed to the Senator's point? Might I read this in this way and see if this answers?

"The trial judge in any case submitted to the jury on issues of fact arising on pleadings may reserve any question of law," and then go on.

Would that obviate your point that there should be no discretion in the court about denying a man a jury trial if he is entitled to one? What the court then does is to give him his jury trial and reserve the question of law to go up on. I offer that as a suggestion.

Senator CULBERSON. I rather think that would obviate the criticism I had in mind, but I would like to examine it more carefully.

I want to reserve the jury trial if the parties are entitled to it and not to leave it to the discretion of the court, and I would compel the Federal judges to deliver charges in writing. Of course, if oral it may be taken by a stenographer, so it can be reviewed properly. That is the only suggestion I care to make about it. I rather agree to the first paragraph, but I do not want anything that can possibly be construed to mean that the right of trial by jury is to be left to the discretion of the court.

Senator ROOT. My understanding of the effect of the last section would be this: In the first place, I thought it was intended to apply only to causes triable before a jury, not to nonjury cases, that it was designed to enable the court to call for a special verdict instead of a general verdict, so that instead of leaving to the jury to find for the plaintiff or for the defendant, upon a charge stating a number of doubtful propositions of law, the court can leave to the jury the questions, Did the defendant make the note; did the defendant pay the note; did the plaintiff and defendant agree that such and such would be accepted in satisfaction of the note; and taking a special verdict upon the specific issues of the case, then determine whether the judgment upon those findings of fact of the jury should be for the plaintiff or the defendant; so that the case could be reviewed all the way up, without the necessity of sending the parties back for another trial upon the questions of fact.

In other words, the first trial on the issue of facts would be final for all purposes of the case, a thing which seems to me to be very greatly in the interest of the honest litigant of slender means, as compared with the present practice, which I think enables the dishonest litigant of abundant means, who can afford to litigate until kingdom come, an opportunity to hinder justice by delay. That is the idea I have about that.

Senator CULBERSON. The language would seem to me to imply a trial on the whole case and not any special verdict. It says: "The trial judge may in any case submit to the jury the issues of fact arising upon the pleadings." Now, if this read: "The trial judge may in any case submit to the jury any issue of fact," then it would rather imply that the Senator from New York is correct in the object to be accomplished.

Senator ROOT. Why not make that "any issues of fact"?

Mr. WHEELER. You might say any "specific issues of fact."

Mr. WHITMAN. Under our practice in Illinois, which is under the old common law practice, we have special findings of fact there that we may ask for and have submitted if they are properly requested. The special verdict that the Senator speaks of we do not use in just that way. My impression of the effect, taking our own practice there, would be that the clause would be elastic enough to cover a special verdict or a verdict that had the simple phrase in it, did he or did he not pay; and if not, how much does he owe? That does not have to be tried again.

Senator CULBERSON. It used to be that in Texas they could submit special issues to the jury, but this as it reads now appears to me to leave it to the authority of the judge as to whether he shall submit all the facts at issue to a jury.

Mr. WHEELER. That is not the intention.

Senator CULBERSON. That may not be so, but I would like to think it over.

Mr. WHEELER. If it strikes you so, I am sure we would like to have it amended. You might have it read: "The trial judge in any case tried before a jury may submit specific questions to be answered by the jury and may reserve any question of law," and go on.

Senator CULBERSON. I do not think I would have any objection to that, because that would leave the question of the right of trial by jury as it is now.

Mr. WHEELER. That was the intention.

Senator CULBERSON. And would apparently carry out Senator Root's suggestion as to giving authority to submit special questions. I will ask the stenographer to read that last suggestion of Mr. Wheeler.

The stenographer read as follows:

The trial judge in any case tried before a jury may submit specific questions to be answered by the jury and may reserve any question of law, etc.

Senator CULBERSON. What do you think of that?

Senator ROOT. That strikes me rather favorably.

Mr. WHEELER. How does that strike you, Mr. Whitman?

Mr. WHITMAN. I think it would be all right. The only question is on the word "question." It is a finding of some sort they are to make, whether special or general.

Mr. WHEELER. We call them "questions" in New York.

Mr. WHITMAN. What we really mean, I think, is "findings," but the judge submits the questions. I merely make that as a suggestion—as a broader word.

Mr. WHEELER. You see it does not become a finding until the jury have answered it. The question and the answer make a finding.

Mr. SANER. Would not the word "issue" be the better word?

Mr. WHEELER. That would be satisfactory to me. That is the old common law.

Senator ROOT. Submit "specific issues" I would say.

Mr. WHEELER. And you say "to be passed upon."

Senator CULBERSON. There will not be any trouble about the language if you agree upon the substance.

Mr. WHEELER. "To agree upon specific issues to be passed upon."

Senator CULBERSON. The words of the proposed act are all right, "the issues of fact;" you can not very well improve upon that language.

Senator ROOT. Mr. Wheeler has made a suggestion that we should say "specific issues of fact."

Mr. WHEELER. Perhaps this would cover it: "The trial judge in any case tried before a jury may submit specific issues of fact arising upon the pleadings." That would cover it.

Senator ROOT. "The trial judge may in any case tried before a jury submit specific issues of fact to be passed upon." I think that covers it.

Senator CULBERSON. I think I will be favorable to this, but we have to submit it to the other members of the committee.

Senator ROOT. We will now take up Senate bill 3749, which is designed to authorize the Supreme Court of the United States to pass on the Federal question, whichever way it is decided in the courts of the States. That is the substance of it.

[S. 3749, Sixty-second Congress, second session. In the Senate of the United States, December 13, 1911. Mr. Nelson (by request) introduced the following bill; which was read twice and referred to the Committee on the Judiciary.]

A BILL To amend an act entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section two hundred and thirty-seven of chapter ten of an act entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven, is hereby amended so as to read as follows:

"SEC. 237. A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States; or where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, may be reexamined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in the court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, at their discretion, award execution or remand the same to the court from which it was removed by the writ."

Senator CULBERSON. I think the jurisdiction of the Supreme Court is pretty far-reaching already, and I want to know at the outset whether this enlarges it.

Senator ROOT. It does undoubtedly, I think.

Mr. WHEELER. I think it does.

Senator CULBERSON. It used to be that you could only take a writ of error when the decision was against. Now you can take it in either case.

Mr. WHEELER. Under this proposition. In the District of Columbia the right exists; there may be a writ of error whichever way the constitutional question is decided in the court below. What has brought this to our attention, and led us to consider it seriously, is the situation which has arisen under the various acts of the different States with regard to workmen's compensation. As you know, there have been laws in many of the States providing a more extended remedy in the case of workmen who are injured in our great manufactories. It has come to pass that the development of machinery is such that such accidents ought to be considered more a risk of the business than they were at common law, when business was on a smaller scale and the employer and employee were more nearly on the same ground.

The complaint has been made against those statutes that inasmuch as they took from the employer a certain amount of money to which the workman was not entitled, at common law, they were depriving the employer of his property without due process of law, and the court of appeals in New York has so decided in the Ives case. That is found in 201 New York, 271. In other States, notably in Wisconsin, and in the State of Washington, the decision has been the other way. So, in these different States the Constitution of the United States means different things. In New York it means one thing, and

it means another thing in the two other States I have referred to. Well, that is not the only sort of legislation that is being considered. There is a general, you might say a world-wide, spirit of bringing about a more equitable method of dealing with the management of great railroads and manufactories, and we, I think, ought to recognize that.

Senator CULBERSON. May I interrupt?

Mr. WHEELER. Certainly.

Senator CULBERSON. So as to get it clearly in my mind.

Mr. WHEELER. I am very glad to have you interrupt.

Senator CULBERSON. Is it the purpose to strike out the words in section 237, "and the decision is against validity," and the other words in italics shown in your committee report?

Mr. WHEELER. Yes; that is what it does strike out.

Senator ROOT. Whenever you are through, Mr. Wheeler, I want to ask a question.

Mr. WHEELER. I will give you this copy of our Bar Association Report. I intended to bring enough copies to give every member one, but I find I have not sufficient.

Senator ROOT. I thought maybe you had them printed in parallel columns.

Mr. WHEELER. In this report of the special committee of the American Bar Association you will find it printed in italics, with the words desired to be struck out indicated.

Senator ROOT. Will you please send enough copies so that each member of the Judiciary Committee may have one?

Mr. WHEELER. I will be glad to do so.

It turns on the importance of having the Constitution of the United States interpreted alike in all the States. The Constitution gives to the highest court the power to pass upon the validity of the laws of the different States. The Constitution declares that the Constitution itself, and the laws made in pursuance thereof, shall be the supreme law of the land, anything in the constitution or the laws of any State to the contrary notwithstanding. Legislation has given the Supreme Court the right to review a decision by a State court when that court decides in favor of the State law, but if the State court decides against the State law there is no right of review. And yet one man may be just as much interested personally in supporting the State law as another man is in opposing it. Take this workmen's act, which I have used for illustration. A man that has lost an arm or leg by machinery in a factory may not be able to prove that the employer is at fault. The object of the workmen's compensation law is, on the one side, to limit the amount of liability, and, on the other side, to extend it to more cases. If the State court says "No; we will not let you recover damages in such a case, because that law you rely on is in violation of the Constitution," why should you not give the plaintiff a right to be heard before the Supreme Court in support of what he claims under the State law?

It seems to me manifestly just that you should, and this extension of the jurisdiction of the Supreme Court is an equitable extension, and one that will tend to promote the welfare of our people and to bring about a uniformity of law.

We lawyers know the history of this clause, but you can not explain to the man in the street the justice of having the Constitution mean

one thing in one State and another thing in another State. You tell him that the Constitution means what the court says it means. That ist rue. But when one court says one thing and another court says another thing, it would seem obvious that there should be some supreme tribunal that can settle that. Unless this Washington defendant should choose to bring a writ of error—it is a test case, and the amount involved is not much, and we have no reason to believe that he will bring it—we remain under the present difficulty.

Well, this act would apply not only in that class of cases, but in a great many other cases affecting the relation of the workman and the employer which have been made the subject of controversy under this clause of the Constitution declaring that no man shall be deprived of property without due process of law. I think that we must admit that there is a great deal of dissatisfaction vaguely spread throughout the country growing out of this diversity of judgments in the State courts. Sometimes that dissatisfaction has been very unreasonably expressed, and I have no sympathy with that. I believe that the courts are one of the most important parts of our system and that respect for them is to be cultivated and impressed; but you do not secure that respect by having a diversity of opinion on the constitutional rights of the citizen which there is no way to cure.

We submit, therefore, with a good deal of confidence, that this bill may fairly receive the favorable consideration of the Senate.

Senator ROOT. Mr. Wheeler, may I ask whether the same result you seek to accomplish could not be accomplished by giving the Supreme Court the right to bring up by certiorari, so it would not give to the parties in every case where the Federal question was involved, and where the decision was in favor of the claim under the Constitution or statutes of the United States, the right to go to the Supreme Court of the United States and cumber their calendar and delay the proceedings of others? Would not the jurisdiction vested in the Supreme Court to bring up by certiorari such a decision, which they could exercise whenever there is a conflict, answer every purpose?

Mr. WHEELER. Personally, I should think so. I have not talked to the other members of the special committee representing the bar association about the matter.

Mr. WHITMAN. Senator, would that mean that as at present, for instance, the employer, we will say, for short, might go up if the law were declared constitutional by the court in which he was——

Senator ROOT. That is, if the State law was declared constitutional?

Mr. WHITMAN. Yes.

Senator ROOT. Yes.

Mr. WHITMAN. But would that mean if the plaintiff were to go up he would have to go by the certiorari route? In other words, are you going to give a writ of error to the losing party if one party loses, but if the other party loses are you going to give him certiorari? I think that would be subject to severe criticism if such a thing were done. I do not know that I make it clear.

Senator ROOT. It would not be giving a writ of error to the litigant who makes a claim under the Constitution or laws of the United States and has his claim disallowed, for he has that already.

Senator CULBERSON. Under the old statute?

Senator ROOT. Yes. The question is when a claim under the Constitution and laws of the United States is allowed, so that there

can be no claim of violation of the Constitution and laws of the United States, whether then for the purpose of securing uniformity of decision upon the constitutional questions, you should let everybody come up or merely confer upon the Supreme Court the power to bring up by certiorari. The theory of the present statute is, when a claim under the Constitution and laws of the United States has been made and allowed, that no one has any grievance which is properly the subject of Federal cognizance, because all his rights under the Federal statute have been preserved by the State court and he has nothing to complain about to the national authorities.

Senator CULBERSON. The present law is that "where there is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity"—that is in favor of the State laws.

Mr. WHEELER. Yes.

Senator CULBERSON. Now, you want to strike out "and the decision is in favor of their validity"?

Mr. WHEELER. Yes, sir.

Senator CULBERSON. And make it subject to a writ of error if it is for or against?

Mr. WHEELER. Either way; yes.

Senator ROOT. So that would be that when a State court has held a statute of a State to be invalid you could appeal to the Supreme Court of the United States as against their decision.

Mr. WHEELER. If it holds that it is invalid by reason of the question of constitutionality.

Senator CULBERSON. From the Federal standpoint?

Mr. WHEELER. Yes.

Senator ROOT. It seems to me the only justification for that is in what you have just presented, and that is on account of the importance of securing uniformity of decision in regard to the meaning and effect of the Federal Constitution and laws, and that that can be accomplished by vesting in the Supreme Court the power to bring up a case by certiorari, and that that is as far as it is desirable to go.

Senator CULBERSON. I understand that some of the courts in New York have held the employers' liability act void.

Mr. WHEELER. Yes.

Senator CULBERSON. As being against the Constitution of the United States?

Mr. WHEELER. Yes.

Senator ROOT. That is the Ives case.

Senator CULBERSON. And that is not now subject to writ of error.

Mr. WHEELER. That is correct.

Senator CULBERSON. And you want to make it so?

Senator ROOT. That is the Ives case, 201 New York, 271.

Mr. WHEELER. Yes.

Senator ROOT. The New York Court of Appeals, with many expressions of regret and a very strong statement in their belief of the wisdom of the statute, held that, nevertheless, the statute contravened the fourteenth amendment, taking the words "without due process of law," whereas in Washington the court has held that a similar statute did not contravene that provision.

Senator CULBERSON. They can bring that up on a writ of error.

Mr. SANER. If they are disposed to do so; yes.

Senator ROOT. The Washington people can, but the others can not.

Senator CULBERSON. You say the opinion in New York was against the constitutionality of the statute? How was that opinion; was it unanimous?

Mr. WHEELER. Yes, sir; but they reversed the opinion in the appellate division of the Supreme Court of the State of New York.

Senator CULBERSON. Who rendered the opinion?

Mr. WHEELER. Judge Werner.

Senator CULBERSON. Is Judge Gray still on the bench?

Mr. WHEELER. Yes, sir.

Senator CULBERSON. And Judge Cullen is chief justice?

Mr. WHEELER. Yes. It is very interesting to us to see that you keep up with the personnel of our judiciary so well.

Senator CULBERSON. In other words, here is the same identical question presented by the courts of Washington and New York, where the question involved has been decided by the supreme court of each of those States, and only one of those is subject to review by the Supreme Court of the United States.

Mr. WHEELER. Precisely.

Senator ROOT. Are there any further remarks to be made?

Mr. WHITMAN. I hardly know of anything to add. There it is.

Senator ROOT. Do you desire to add anything, Mr. Saner?

Mr. SANER. No; I have nothing to add.

Mr. WHEELER. We are very much indebted to the committee for their attention and consideration, and, as I said before, I will send copies of the report of the special committee so that each member of the committee may have one.

The report was ordered included in this record and is as follows:

REPORT OF THE SPECIAL COMMITTEE TO SUGGEST REMEDIES AND FORMULATE PROPOSED LAWS TO PREVENT DELAY AND UNNECESSARY COST IN LITIGATION.

[To be presented at the meeting of the American Bar Association at Boston, Mass., August, 1911.]

To the American Bar Association:

The special committee appointed at the meeting of this association in 1907 and continued at each annual meeting since then was charged with the duty of considering carefully alleged evils in judicial administration and remedial procedure, and suggesting remedies and formulating proposed laws.

We were authorized at the last meeting to present to Congress at its next session the bills heretofore reported by the committee and recommended by this association, in such form as to obviate as far as possible the objections thereto that have been taken in Congress, but retaining the essential principle of the bills heretofore recommended by the association. These bills were specifically recommended by the President in his annual message, December, 1910 (p. 44).

The association at that meeting approved the recommendation of our committee respecting the practice in admiralty, and we were instructed to bring the subject to the attention of the Supreme Court of the United States and to request that honorable court to adopt a rule in admiralty which should direct that the testimony in admiralty cases be taken in open court, subject to the provisions of the statute in regard to depositions de bene esse.

We were also authorized to consider a general-practice act and to report thereon at this meeting. In this connection two resolutions were referred to us for consideration. The first of these was presented by Mr. Thomas Wall Shelton, and is as follows:

"*Resolved*, That in whatever form of pleading that may be adopted there shall be preserved the common-law limitation upon the court—that whatever is not judicially presented can not be judicially determined."

The other resolution was offered by Mr. Ernest T. Florance:

"*Resolved*, That the committee to suggest remedies and formulate laws, etc., be instructed to consider the preparation of a bill providing for the abolition of difference of forms of procedure between actions at law and cases in equity in the Federal courts."

1. In accordance with the instructions of the association we presented to Congress at its last session beginning in December, 1910, the bills which had been recommended and approved by this association, which are to be found in full on pages 7 to 10 of our last report (pp. 620 to 623, vol. 35, for 1910). The bills were referred in each House to the Committee on Judiciary. We had a hearing before the full committee of the House of Representatives and before the subcommittee of the Senate consisting of Senators Nelson, Dillingham, and Overman. We also had many interviews and much correspondence with individual members of both committees. The question whether the amendments to procedure proposed in the first two sections of the bill would interfere with the province of the jury was debated very fully at the public hearing and in discussions with individual members. We endeavored to convince the committees to whom the matter was referred that so far from impairing the value of a trial by jury the amendments proposed tended to increase its value and to promote the determination of causes upon the merits rather than upon technical objections which do not affect the merits and to which juries pay no attention. We pointed out that by giving more finality to the verdict of a jury, rendered when the facts of a case are fresh in the memory of witnesses, and permitting the appellate courts to pass directly upon the questions of law involved, without the necessity of ordering a new trial, we would make it possible to terminate every cause upon its real merits, present these merits fairly to the court, and put an end to the litigation as soon as this can be done consistently with giving a full and fair hearing to both parties.[1]

We could not discover that there was any serious objection in either committee to these two sections except that arising from a conservatism which is reluctant to make any change whatever. Nevertheless our efforts failed to obtain a report to the House or the Senate from the full committee of either body. The subcommittee of the Senate reported the bills to the full committee of that body.

There were also objections made to the third, fourth, fifth, and sixth sections of the bill to regulate judicial procedure. These relate to writs of error and appeals in criminal cases and habeas corpus proceedings. Some members of each committee were unwilling to put any limitation whatever upon the right of appeal in criminal cases.

Meanwhile the pending bills had attracted much attention in the House of Representatives. Many Members had become interested in them. It will be remembered that there was pending in the House of Representatives a bill which had been originally prepared by the Commissioners to Revise the Statutes of the United States, and which had been referred to a committee of the House of Representatives known as the Committee on the Revision of the Laws. Of this committee, Hon. Reuben O. Moon, of Pennsylvania, was chairman. He was also a member of the Judiciary Committee. When this measure was first under consideration before a joint committee of both Houses in 1906, a meeting of the lawyers of New York who practice in the Federal courts was held at which several amendments were agreed upon and suggested to the joint committee. Among the amendments which were suggested at that time there were six which substantially proposed the reforms in procedure which were afterwards recommended by this association and embodied in the bill to regulate the judicial procedure of the United States already referred to.

These amendments in 1906 were drawn so as to correspond to the bill in the form in which it was then before the joint committee. It seemed, however, that there was no likelihood of this bill being seriously taken up by Congress, and in the original report of this committee we thought it expedient to recommend these amendments as separate measures drawn with reference to the Revised Statutes as they then existed. But the unexpected happened. The new committee of the House of Representatives on the Revision of the Laws reported to the House, with some amendments, the bill which had been drafted by the commissioners, and succeeded in getting their report upon the calendar in such a form that it had the right of way, and did receive during several successive weeks, on the days set apart for the reports of committees, very full consideration. In view of this fact your committee conferred with several members of the Committee on Revision of the Laws, and especially its chairman, Mr. Moon. It was agreed that when section 254 of the judiciary act came up for consideration, the first two sections of the association's bills, combined into one section, should be moved as an amendment to the reported bill.

Meanwhile Mr. Madison, of Kansas, had become so much impressed by the arguments presented in support of the association bill that after conference with your com-

[1] Church *v.* Hubbart (2 Cranch, 232).

mittee he introduced in the House as a separate bill, a section embodying the first two sections of the association bill in the form in which they had been agreed to before the Judiciary Committee. After considerable discussion this bill passed the House unanimously. It went to the Senate, was referred to the Judiciary Committee, but all the efforts of your committee were unavailing to procure a report upon it. The expressions of opinion from individual Members of the Senate were so favorable that we had reason to believe that if the bill could have been gotten out of committee it would have passed the Senate. The other method which had been planned to bring the bill before the Senate failed because of the fact that there was so much debate in the House upon the early sections of the judicial code (as it is designated in sec. 296), which relate to judicial districts and to the jurisdiction of the district courts, that section 254 was not reached for consideration. The code, with numerous amendments which were made in the House, was finally passed under a suspension of the rules. The Senate meanwhile had passed the code in a different form. They both went to a conference committee and the judicial code finally passed in the form with which the association has already become familiar.

We may say that as this code was drawn by the Commissioners on the Revision of the Statutes it effected very little change in the practice of the Federal courts with one single important exception. It did consolidate the courts of original jurisdiction into one court, to be known as the District Court of the United States in each judicial district, and it did abolish the circuit courts. This is in accord with the recommendations of our report in 1910. As drawn by the commissioners it failed entirely to provide for the numerous instances in which it is desirable to have an order made by one judge operative in the whole circuit. For example, in railroad foreclosures it is of great importance that a receivership should extend throughout the entire circuit in which the railroad runs. This defect was, however, corrected in the House, the amendment was adopted in conference, and is included in the bill as finally passed and signed by the President.

We append hereto (schedule A) a copy of the bill recommended by your committee which passed the House, and we recommend that the committee be authorized to present this bill at the next session of Congress in the form in which it passed the House as an amendment to section 269 of the judicial code, and urge its adoption upon both Houses of Congress.

2. The sixth section of the bill recommended by this association is incorporated in the judicial code. Section 128 of this code gives to the circuit courts of appeal jurisdiction to review by writ of error the judgments of the district courts in all criminal cases, including capital cases, and makes their judgment final, except in cases involving constitutional questions.

We also recommend that the remaining sections of the bill to regulate the judicial procedure of the courts of the United States, recommended by this association in 1910, be embodied in a separate bill and recommended for adoption by Congress.

3. It will be of interest to the association to put on record some results of the agitation for a change in the method of dealing with errors alleged to have been committed by trial courts. In courts of justice in this country, quite apart from any legislation, the change is very manifest.

For example, in Vicksburg & Meridian R. R. Co. *v.* O'Brien (119 U. S., 99, 103; 30 Law. Ed., 299, 300), decided November 1, 1886, Mr. Justice Harlan said:

"While this court will not disturb a judgment for an error that did not operate to the substantial injury of the party against whom it was committed, it is well settled that a reversal will be directed unless it appears beyond doubt that the error complained of did not and could not have prejudiced the rights of the party."

Waite, C. J., and Field, Miller, and Blatchford, JJ., dissented.

The dissent on the part of these four eminent judges has received the approval of the court in subsequent cases. For example, in Standard Oil Company *v.* Brown (218 U. S., 84, 86; 54 Law. Ed., 945, 946), decided May 31, 1910, the court said:

"The rule is familiar and elementary that the pleadings and proof must correspond, but a rigid exactitude is not required."

The court held that errors in the charge or refusal to charge would not be considered as reversible error when it was plain that the issues had been fairly presented to the jury.

The reason for the change is well stated by the Court of Appeals of the State of New York in People *v.* Gilbert (199 N. Y., 28), decided in 1910:

"The objection is purely technical, and technical objections are no longer regarded as serious unless they are so thoroughly supported by authority that they can not well be disregarded, even under the latitude of the statute relating to the subject. The criminal law is fast outgrowing those technicalities which grew up when the punishment for crime was so severe as in many cases to shock the moral sense of lawyers,

judges, and the public generally. When stealing a handkerchief worth 1 shilling was punished by death, and there were nearly 200 capital offenses, it was to the credit of humanity that technicalities should be invoked in order to prevent the cruelty of a strict and literal enforcement of the law. Those times have passed, for the criminal law is no longer harsh or inhumane, and it is fortunate for the safety of life and property that technicalities, to a great extent, have lost their hold. We overrule the contention of the defendant in regard to the indictment, because it is founded on a technicality, with no support in authority and with but slight support in reason."

Judge Coxe, delivering the opinion of the circuit court of appeals in Press Publishing Co. *v.* Monteith (180 Fed., 357), thus states the change that some courts have already made in dealing with the subject of "reversible error."

"The defendant, realizing apparently that even upon its own presentation no very serious error has been committed, invokes the archaic rule that if error be discovered, no matter how trivial, prejudice must be presumed. The more rational and enlightened view is that in order to justify a reversal the court must be able to conclude that the error is so substantial as to affect injuriously the appellant's rights.

"Prejudice must be perceived, not presumed or imagined.

"The writer, speaking only for himself, is in hearty accord with the modern tendency.

"The object of all litigation should be to arrive at a just result by the most direct, speedy, and inexpensive proceedings. If such a result can be reached by absolutely inerrant methods so much the better, but while the administration of justice is in the hands of merely finite beings, such perfection can hardly be expected. I venture to think that no long-continued, hotly contested trial can be conducted to a conclusion without mistakes being committed. Few minds are so constituted that they can grasp at the outset all the ramifications of a complicated controversy and, before the judge can get the perspective of the trial, some mistakes may occur, but these should be disregarded if it can be seen that the case was correctly decided and that, even if they had not been made, the same result would have been reached. Justice can be attained without infallibility.

"One of the English rules provides:

" 'A new trial shall not be granted on the ground of the misdirection of the jury or of the improper admission or rejection of evidence, unless, in the opinion of the court to which the application is made, some substantial wrong or miscarriage of justice has been thereby occasioned on the trial.'

"Were such a rule in force here, even assuming that defendant's contentions are correct, the court would be unable to say that substantial wrong has been done the defendant. In several instances the alleged error was subsequently corrected and the excluded evidence supplied.

"The granting of a new trial is often a denial of justice, witnesses die or remove beyond the jurisdiction of the court, and the resources of the litigants become exhausted.

"Believing as we do that the libel here was without justification or excuse and that the verdict was not excessive, we should hestiate long before requiring the plaintiff to begin anew the weary pilgrimage through the courts."

Legislation which embodied substantially the rule of decision recommended by this association has been adopted by the legislatures of Kansas, Illinois, and Wisconsin, and has been under consideration in the legislatures of Ohio and New York. We hope that during the present year it will appear that these changes have become part of the legislation of the latter State. It has been recommended by the State Bar Association and by the Bar Association of the City of New York, which is believed to be the oldest, and is certainly one of the most conservative, bar associations in America.[1]

4. While the association had under consideration the bill to diminish the expenses on proceedings of appeal and writs of error, the Bar Association of the State of Washington had prepared a different bill, intended and adopted to accomplish the same purpose as our own. In justice to ourselves we feel bound to say that we think that the form recommended by this committee and adopted by the association was more in harmony with existing legislation than the bill drawn in Washington. It is, however, unnecessary to call the attention of the association more particularly to the difference, in view of the fact that the bill as drawn by the association in Washington received the approval of Congress and was signed by the President. It excited at first much unfavorable comment on the part of clerks of the circuit courts of appeals, and it was thought at first that the bill as drawn might make it impossible to meet those expenses of the court which were provided for by the fees of the clerk. We are informed that on more careful consideration this objection seems not to be well taken.

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[1] Reference may also be had to the following cases: Savage *v.* Modern Woodmen, (84 Kans., 63); Harris *v.* State (80 Nebr., 195, 114 N. W. Rep., 168); Byers *v.* Territory of Oklahoma (103 Pac., 532); State *v.* Bird (Mont., 111 Pac., 407).

Your committee is distinctly of opinion that this country ought not to expect that the expenses of the administration of justice should be paid out of the fees exacted from suitors. The country can well afford to maintain its courts, and provide from the Public Treasury for all suitable expenses of the administration of the law.

5. The third bill recommended by the association authorized the appointment of stenographers in the courts of the United States and fixed their duties and compensation.

There is a large and influential stenographers' union. This union had prepared a bill which undertook of itself to fix all compensation without leaving its determination to the judges in the different circuits. Neither of the proposed schemes received the approval of Congress.

6. The next subject which was referred to us was that of limiting the right of appeal from the courts of the District of Columbia to the Supreme Court of the United States. On this subject we have had full consultation with members of the bar of the District of Columbia. We have come to the conclusion that the right of appeal as it now exists, as amended by section 250 of the judicial code, is not productive of so much inconvenience or delay to other suitors from the States of the Union whose cases come before the Supreme Court as had been supposed, and your committee does not at this time recommend any change in the section of that code relating to such appeals.

7. We have prepared the following addition to the forty-fourth rule of the Supreme Court in admiralty, which we recommend for approval by this association:

"That in all cases of admiralty and maritime jurisdiction either party may introduce oral testimony and have examination of witnesses in open court."

The reasons for this amendment are so fully stated in our previous report that we think it unnecessary to repeat them here. If approved, we will submit it to the Supreme Court under the authority heretofore conferred upon us.

8. The same evils that have been felt to exist in admiralty cases in some of the circuits have also been felt in equity cases, caused by the fact that under the existing equity rules testimony in all cases is taken out of court. The complaints on this subject have been so numerous that the Supreme Court itself has appointed a committee, consisting of Chief Justice White, Mr. Justice Lurton, and Mr. Justice Van Devanter, "with directions to consider and report such changes as the committee may conclude would, if adopted, tend to the simplification of pleading and practice and the correction of any unnecessary delay or unreasonable cost resulting from practice under the rules as they now exist." Mr. William J. Hughes has been appointed secretary of this committee, and he has requested your committee to aid the court in the performance of the task which it has undertaken.

Your committee is of opinion that the same reasons which led the association to recommend the adoption of the admiralty amendment are equally applicable to equity cases. It is a well-known fact that in England and many States of the Union testimony in equity cases, on the main issues, is taken in open court. This does not interfere with the practice of referring all matters of account to a master in chancery, but it leaves to the judge himself the determination of the fundamental questions in the case.

Among the objections that have been taken to this practice in equity cases is that the judge will say, "I do not care to hear the testimony, because I must read it." It is not for this committee to declare that no judge will ever make this statement, but we can affirm as a result of our own experience that judges in the State courts do not, and Federal judges, when they are hearing cases in admiralty, do not make such an unreasonable observation. We find the actual practice usually to be, that when the judge hears the testimony he does not read it in extenso afterwards, but refers to it as his attention is drawn by the briefs of counsel or by his own investigation. It is possible that a judge who had not been in the habit of hearing oral testimony in cases of this sort, might at first think that he would be obliged to read the testimony in extenso. But in point of fact one great object of the change is to relieve him from this burden, to give him the testimony in all its freshness, and enable him to ask of the witnesses such questions as may tend to elucidate the case upon the merits. Experience shows that frequently these questions by the trial judge are illuminating, and assist in a most important manner in the ascertainment of the facts.

We may be permitted to refer to the customary practice of one of the great judges of the United States Supreme Court, Mr. Justice Blatchford. He was the first district judge who was promoted to be a Justice of the Supreme Court. His custom was to hear the oral testimony in admiralty cases with the greatest attention, and practically to make up his mind on the facts after the argument of counsel, just as a juryman is required to do when a verdict is asked of him upon the submission of the case. The questions of law arising upon these facts he took for more deliberate consideration. All lawyers who had the privilege of practicing before him know how admirably

this method of dealing with litigated questions conduced to the ends of justice, and how satisfactory it was to the bar.

In New Jersey, which is one of the States where a separate court of chancery still exists, the practice of hearing the testimony viva voce in open court has proved satisfactory both to the bench and to the bar. We are distinctly of opinion that a change in this respect would be beneficial in the Federal courts. There is a reason for its adoption there that does not exist in those jurisdictions where there is a separate court of chancery. A Federal judge sits at law, in equity, and in admiralty. He has experience in hearing oral testimony in the trial of cases at law. In those circuits where the admiralty evidence is taken viva voce he also has that experience. The practice has been so successful in these branches of the Federal jurisdictions that your committee think that nothing but the conservatism to which reference has been made will prevent the adoption of the reformed practice in all equity cases. It may perhaps require the appointment of additional judges. If experience should prove this to be the case, we have the satisfaction of knowing that the country is well able to defray the expense which this would entail. Indeed, the entire annual cost of the judicial administration of the United States is less than that of one of the great battleships which we find it so easy to construct.

The objection is also taken that it would be difficult and expensive to procure the attendance of experts before the judge. We are of opinion that experience would show in equity, as it does now in admiralty cases, that the attendance of witnesses would be arranged for mutual convenience, that some depositions would be taken out of court, but that the most important witnesses would be examined in open court and that the judge would derive from their oral examination a much clearer understanding of the real judgment of the expert. We know that expert testimony sometimes obscures when it should elucidate. The judge would shorten the examination and arrive at the truth more certainly than he now can do.

Another committee of this association has had this subject under consideration. One of its members, Mr. Frederick P. Fish, has formulated the method, stated in schedule B, annexed to this report. Some members of this committee approve the proposition, but we have not been able to consider it in full committee. We submit it for the consideration of the association.

In this connection we call attention to the resolution of Mr. Florance. It was said in the debate at Chattanooga by one of the members, "Under the Constitution of the United States the equity practice exists." It seems to your committee that this is a misapprehension.

What the Constitution does say is this (Art. III, sec. 2, subdivision 1):

"The judicial power shall extend to all cases of law and equity arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority."

This section of the Constitution, in our opinion, recognizes the fact that there is an intrinsic difference between the substantive rules and the remedies which prevail at law and those which prevail in equity. It has never, so far as we are aware, been proposed to abolish or destroy this fact. It certainly has not been destroyed in any of the code States. But the Constitution says nothing about the procedure of the courts. It says nothing about preserving the jurisdiction of the court of chancery as a separate jurisdiction. In fact, the original judiciary act of 1790 abolished this distinction entirely. There has never been since the foundation of the Government a separate Federal court of chancery. Every Federal judge, under the existing system, is a chancellor, and also in propria persona a judge at nisi prius, a judge of the admiralty court and of the bankruptcy court. All that is necessary for the pleader in order to express the distinction is to put at the head of his pleading the words "at law" or "in equity," or "in admiralty."

There is no magic in these particular symbols. No one of them is a shibboleth or a fetish. The court is a unit. There can be no possible reason why the judge, who to-day sits in the jury term, to-morrow holds the equity term, and on the third day holds the admiralty term, should not have full power in either division to administer justice upon the merits. If the pleader by mistake has put the words "at law" in his pleading when he should have put the words "in equity" or "in admiralty," it should be the duty of the judge to make the amendment on the spot. It really seems absurd to say that such a mistake must injuriously affect the substantial rights of the adverse party. If the law is a mere game in which the man who is cleverest in the rules of the game will win, then by all means let us retain these tricks of the trade and add to them all those that once existed, but which have inconsiderately been abolished. But if it be, as we believe, the function of a court to do justice between the parties, all requirements which interfere with the administration of justice should be repealed.

The fears expressed that to break down the procedural distinctions in law and equity cases would impair the constitutional grant of judicial power in "cases of law and equity" is a revival of fears entertained in New York and other States at the time of the adoption of the codes. In Leroy *v.* Marshall (8 How. Pr., 373) Justice Barculo said:

"I am not prepared to deny that the authors of the code may have supposed that law and equity could be administered in precisely the same forms; nor that some sections of the code were designed for that purpose. But every judge knows, and every lawyer should know, that, in practice, the thing is impossible.

"Legal and equitable proceedings are essentially different from each other in their origin, nature, and object. * * * Indeed, it would be a matter of astonishment—if we were permitted to wonder at anything in this line—that any man of 'common understanding' should have suffered the idea to enter his head that legal and equitable proceedings could be molded in the same form and be measured by the same rules. Every person who has studied and understands the law as a science knows that there is substance in the distinctions between actions, and that those requirements which superficial observers call 'unmeaning forms and prolix statements' were really wise and indispensable safeguards and protections in administering the most important as well as the most intricate of human sciences."

In New York & New Haven R. R. Co. *v.* Schuyler (17 N. Y., 592) Judge Comstock remarked that the code "with characteristic perspicacity had in fact abrogated equity jurisdiction in many important cases." Notwithstanding these alarming judicial statements legal and equitable remedies continue to be administered under the codes; legal principles and equitable principles continue to be observed. Many think that they are more conveniently administered and observed under an approximately uniform procedure than they were in those days when a mistake in the choice of a proceeding threw the plaintiff out of court, even if it did not finally defeat his right.

It was for many years the practice in the Federal courts to dismiss a suit which was held to have been brought on the wrong side of the court and compel the plaintiff to resort to another action. But in the recent case of Schurmeyer *v.* Connecticut Mutual (171 Fed., 1) a more liberal practice was adopted. Plaintiff sought relief in an action at law which could only be granted in a suit in equity. This was finally decided by the Circuit Court of Appeals, and the case remanded to the Circuit Court. Judge Amidon in the Circuit Court made an order directing the plaintiff to transform his complaint at law into a bill in equity and directed that the cause be transferred to the equity docket, there to be proceeded with the same as if it had been originally brought as a suit in equity. The Circuit Court of Appeals approved this practice (Ibid., p. 7). The court followed a very able opinion by Judge Shiras in United States Bank *v.* Lyon County (48 Fed., 632).

Your committee has prepared a bill (schedule C), which undertakes to provide a remedy for the evil which has been mentioned. In view of the decision just referred to, it may be that the object of the first section of this bill could be accomplished by a rule of the Supreme Court in equity, which would regulate the practice in all the circuits and conform it to that adopted in the cases just cited.

9. So far as the subject of a general-practice act is concerned, your committee has been entirely unable, within the time which has elapsed since the last meeting of the association, to formulate an act upon this subject. A subcommittee, however, is drafting a preliminary scheme to which your committee, if continued, will be glad to give further and more deliberate consideration.

10. There is one more subject within the scope of the general resolution creating this committee which we have considered, and which we bring to the attention of the association. In the first judiciary act jurisdiction was given to the Supreme Court to review by writ of error a judgment of the highest court of the State in which a party had asserted a claim under the Constitution and laws of the United States, and the decision of the State court had been adverse to this claim. In Cohen *v.* Virginia (6 Wheaton, 414), the Supreme Court held that this grant of power was authorized by that clause of the Constitution to which reference has been had; that such a writ of error was a case arising under the Constitution and laws of the United States, and that it was competent for the Supreme Court to reverse the judgment of the State court. This jurisdiction has been exercised most beneficially and some of the most important decisions of the Supreme Court have been made under the power thus conferred.[1] It is not too much to say that without the powers which the Supreme Court in these cases (in every one of which the decision of the lower court was reversed) maintained for the Federal Government, we should not have been a Nation and would have gone

[1] Dartmouth College *v.* Woodward (4 Wheaton, 518); Gibbons *v.* Ogden (9 Wheaton, 1); McCullough *v.* Maryland (4 Wheaton, 316); The Passenger Tax cases (7 Howard, 288).

to pieces. Indeed, a government without the powers thus asserted would not have been worth preserving. The historic reason for the limitation in the original judiciary act, to wit, that the writ of error should only be permitted where the decision in the State court had been adverse to the claimant, was this: It was thought that the main ground for giving the jurisdiction was that there might be a jealousy of the Federal Government on the part of the State courts. In fact this jealousy did exist in the earlier years of the country's history. Therefore where the decision of the State courts was in favor of the right asserted under the Federal Constitution it was thought there would be no just ground for complaint.

In the present generation we are confronted with a new situation. There are many instances in which the language of portions of the Federal Constitution has been adopted by the constitutions of the several States. In litigated cases rights have been asserted under both constitutions. The rights thus asserted are of exemption from the provisions of laws which in the judgment of the great majority of the people of the States are essential to the public welfare. Take, for example, the subject of compensation for injuries to workmen. The evils which exist under the present system of making compensation for injuries caused by negligence are so great that they have excited universal attention. One of the most serious of them has been condemned by this association in its code of ethics, that is to say, the business which has grown up in large centers, commonly known as ambulance chasing. There are practitioners who keep their scouts on the lookout for accidents, seek employment at once from the injured party, engage to pay the expenses of the litigation upon contingent fees, often amounting to 50 per cent of the recovery. All this business we have condemned, and justly condemned.[1] Yet it is almost a necessary consequence of the failure of the State to make any provision for compensation to be ascertained in a more reasonable manner, and to be determined in advance. At its last term the Court of Appeals of the State of New York held that a workmen's compensation act, which had been adopted by the legislature of that State after very careful consideration and which the court admitted to be beneficial to the public, was in violation of that clause of the fourteenth amendment which has been embodied in the constitution of the State of New York, which provides, "Nor shall any State deprive any person of life, liberty, or property without due process of law."[2] There is a similar clause in the constitutions of most of the States. Similar acts on the subject of compensation for injuries have been passed in many of the States. One very like the New York statute has been passed in the State of Washington, and the question of its constitutionality is under advisement by the supreme court of that State. It seems to many counsel, learned in the law, quite probable that the decision in Washington will be the reverse of that in New York. We shall then be in the position of having the Constitution of the United States mean one thing in New York and another in Washington.

The reason which originally prevailed for the adoption of this limitation upon the right of review has ceased. The reason having ceased, the law should cease. No such limitation is contained in section 250 of the judicial code relating to the review of decrees of the District of Columbia courts. We therefore recommend that this limitation be repealed, and report a bill, schedule D, for that purpose.

We also submit a report from the subcommittee dealing with the subject of law and equity in the Federal courts. This is marked schedule E.

One member of our committee, Mr. Allen, dissents from that portion of the report relating to schedule D. We submit a copy of his dissenting memorandum marked schedule F.

We recommend for adoption the following resolutions:

"*Resolved*, That the special committee to suggest remedies and formulate proposed laws be continued with the powers heretofore conferred upon it.

"*Resolved*, That it be discharged from further consideration of the subject of District of Columbia appeals.

"*Resolved*, That the American Bar Association approves the provisions of the bill to amend chapter eleven of the judicial code of the United States, reported by said special committee.

"*Resolved*, That the American Bar Association approves the provisions of the bill to extend the right of review in cases arising under the Constitution of the United States, reported by said committee, being an amendment to section 237 of the judicial code.

"*Resolved*, That the American Bar Association approves the amendment to admiralty rule No. 44 reported by said committee.

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[1] Canons 27, 28: 33 Reports American Bar Association, 582, 583.

[2] Ives *v.* South Buffalo R. Co., decided May, 1911.

"*Resolved*, That the said committee be instructed to bring the portion of the report relating to equity practice to the attention of the Justices of the Supreme Court of the United States.

"*Resolved*, That the said committee be instructed to take such steps as it shall deem expedient to procure the introduction and passage of said bills at the next session of the Congress of the United States and to recommend the same to the attention of the committees of Congress to which the said bills may be referred.

"All of which is respectfully submitted.

"EVERETT P. WHEELER, *Chairman*.
"ROSCOE POUND.
"CHARLES F. AMIDON.
"JOSEPH HENRY BEALE.
"FRANK IRVINE.
"SAMUEL C. EASTMAN.
"HENRY D. ESTABROOK.
"CHARLES E. LITTLEFIELD.
"EUGENE A. BANCROFT.
"STEPHEN H. ALLEN.
"ARTHUR STEUART.
"JOHN D. LAWSON.
"SAMUEL SCOVILLE, Jr.
"WILLIAM L. JANUARY, *Secretary*.

"BOSTON, *August 29, 1911*."

SCHEDULE A.

[H. R. 31165.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, No judgment shall be set aside, or reversed, or new trial granted, by any court of the United States in any case, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless, in the opinion of the court to which application is made, after an examination of the entire cause, it shall appear that the error complained of has injuriously affected the substantial rights of the parties. The trial judge may in any case submit to the jury the issues of fact arising upon the pleadings, reserving any question of law arising in the case for subsequent argument and decision, and he and any court to which the case shall thereafter be taken on writ of error shall have the power to direct judgment to be entered either upon the verdict or upon the point reserved, if conclusive, as its judgment upon such point reserved may require.

Passed the House unanimously, February 6, 1911.

SCHEDULE B.

I am satisfied that there can be no real reform in equity procedure and practice in the United States courts until there is a judge in control of each case from the time the pleadings are completed, with a definite feeling of responsibility on the part of the judge that he is to control the procedure. Specifically I believe that the best possible plan would be this:

As soon as the pleadings are completed the case should be assigned to a judge who will practically control it from that moment. He should immediately bring counsel together and find out what the case is about. He should learn specifically what is the nature of the controversy and definitely what are the defenses. He should then determine which of those defenses could properly and fairly be tried in open court. If he found, on this preliminary hearing, that there was testimony to be taken out of the circuit or that certain testimony could not be produced in open court, he should then and there appoint an examiner to take this particular testimony within a fixed time, which of course he could extend if necessary. If any questions arose in the course of this testimony, he should not refuse to pass upon them, but should recognize an obligation to do so.

At this preliminary hearing, having arranged for taking the testimony that must be be taken before an examiner, the judge should set the case down for hearing at a fixed date, at which time the rest of the testimony would be taken orally before him. At the trial there would be the depositions taken before the examiner and a stenographic report of the testimony taken from day to day in open court. In all the great centers testimony taken one day could be printed the next morning.

If at any time during the trial there was a surprise or any ground for so doing, the court would adjourn the hearing for a time, that the parties might have the opportunity to meet the new conditions. The trial in open court would be resumed at the expiration of the period of adjournment.

The rule of Blease *v.* Garlington should be amended so that the trial judge could deal with testimony in equity substantially as he deals with testimony at law. The rights of a party offering testimony which the trial judge rejected could be protected by a statement from counsel offering the testimony as to what it was and what he expected to prove. The appellate court could then determine whether the testimony had been properly or improperly excluded, and if its view was that the testimony had been improperly excluded, the case could be sent back for the single purpose of taking this testimony.

It would be an enormous gain in patent cases if the experts should be forced to testify in the presence of the court. I have no doubt that the length of expert depositions would be reduced 75 per cent and the court would be sure to understand the experts. The court would check the expert whenever he got away from the points of the case and would check the cross-examination when the same was improper.

If cases were prepared in this way, a very large number of them could be decided by the trial judge before he left the bench at the close of the hearing. His opinion would be taken down stenographically and subsequently revised by him if necessary. He would be spared the necessity of reading an enormous record, with the subject matter of which he was not familiar, for the sake of getting at the comparatively few points upon which every case ultimately is determined.

FREDERICK P. FISH.

SCHEDULE C.

AN ACT To amend chapter eleven of the judicial code.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter eleven of the judicial code, entitled "Provisions common to more than one court," shall be amended by adding at the end thereof new sections to be known as sections 274 A and 274 B, to read as follows:

SEC. 274 A. In case any of said courts shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form.

SEC. 274 B. In all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense or seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal, the appellate court shall have full power to render such judgment upon the record as law and justice shall require.

SCHEDULE D.

AN ACT To amend section 237 of the judicial code.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled: That Section 237 of the judicial code be, and the same is hereby, amended so as to read as follows:

SEC. 237. A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States [*and the decision is against their validity*]; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States [*and the decision is in favor of their validity*]; or where any title, right, privilege, or immunity is claimed under the

Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States [*and the decision is against the title, right, privilege, or immunity especially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority*], may be reexamined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, at their discretion, award execution or remand the same to the court from which it was removed by the writ.

The bracketed words in italics are to be omitted.

Schedule E.

Report of subcommittee upon the resolution of Mr. Florance and that of Mr. Shelton.

I.—*Law and equity in the Federal courts.*

The first question in any proposed reform in Federal procedure with respect to the absolute separation of legal and equitable proceedings must be one of constitutionality. There are many dicta in the books to the effect that such a separation is required by provisions of the Constitution. It may be well to set forth these dicta.

"It is undoubtedly true, as contended for in the argument of the complainant, in regard to equitable rights, that the power of the courts of chancery of the United States is, under the Constitution, to be regulated by the law of the English chancery; that is to say, the distinction between law and equity as recognized in the jurisprudence of England is to be observed in the courts of the United States in administering the remedy for an existing right. The rule applied to the remedy and not the right. * * * It is the form of remedy for which the Constitution provides." (Taney, C. J., in Meade *v.* Beale, Taney, 339, 361 (1850).)

This dictum of Chief Justice Taney (at circuit) has been cited as meaning that the Constitution provides for a proceeding in chancery for all rights to which such proceedings were appropriate under the old English practice. But, properly apprehended, such is not its meaning. The learned Chief Justice saw, what many have pointed out since, that the distinction was one of remedy; that for certain situations our legal system provides a remedy by a command addressed to and enforced against the person, and that the Constitution expressly provides that the Federal courts shall administer this type of remedy in appropriate cases. It does not provide, nor does the dictum above quoted say that it provides, any procedure by which the type of remedy in question is to be sought or in which it is to be awarded.

A number of subsequent dicta, however, are put more sweepingly:

"The Constitution of the United States, in creating and defining the judicial power of the General Government, establishes this distinction between law and equity; and a party who claims a legal title must proceed at law." (Taney, C. J., in Bennett *v.* Butterworth, 11 How., 669, 674 (1850).)

Here, again, what is meant is that one whose claim is legal must have a legal remedy; not that this remedy must be sought in any particular form of proceeding. The former was all that the court had to decide.

"In the last-mentioned case [Bennett *v.* Butterworth, *supra*] the Chief Justice, in delivering the opinion of the court, says: 'The Constitution of the United States has recognized the distinction between law and equity, and it *must* be observed in the Federal courts.' In Louisiana, where the civil law prevails, we have necessarily to adopt the forms of action inseparable from the system. But in those States where the courts of the United States administer the common law they *can not* adopt these novel inventions, which propose to amalgamate law and equity by enacting a hybrid system of pleadings unsuited to the administration of either." [Italics in the original.] (Grier, J., in McFaul *v.* Ramsey, 20 How., 523, 525 (1857).)

This protest against the attempt of the Federal district court for Iowa to apply the Iowa code of civil procedure was well taken. Beyond that, the passage is only one of many oracular pronouncements to be found in the books, when the codes of procedure were new, which have been refuted by the event.

"The only way in which the defendant could have effectively raised the question of his liability as a shareholder, arising from frauds committed by the bank or its officers before its suspension whereby he was induced to become a shareholder, was by a suit in equity against the bank and the receiver. Instead of pursuing that

course, he sought by interposing an equitable defense to defeat this action at law brought by the receiver under the statute. That can not be done because under the Constitution of the United States the distinction between law and equity is recognized, so that in actions at law in a circuit court of the United States equitable defenses are not permitted." (Harlan, J., in Lantry *v.* Wallace, 182 U. S., 536, 550 (1900).)

"There is a fundamental distinction growing out of the Federal Constitution and legislation between legal and equitable procedure. The seventh amendment to the Constitution provides that in 'suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' And section 16 of the judiciary act of September 24, 1789, reproduced in section 723 of the Revised Statute, enacts that 'suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law.' These constitutional and statutory provisions control the procedure of the Federal courts." (Bradford, J., in Jones *v.* Mutual Fidelity Co., 123 Fed., 507, 517 (1903).)

Here the matter is put upon its true ground, namely, the seventh amendment and Federal legislation, and it may well be that the preceding extract in reality proceeds upon the same idea.

We have, then, three matters to consider, when legal and equitable procedure in a Federal court are before us: (1) The constitutional recognition of law and equity in the provision conferring jurisdiction upon the courts of the United States; (2) the seventh amendment; (3) Federal legislation providing for distinct procedure at law and in equity. The first of these is the basis of some or even of all but the last of the judicial pronouncements above quoted. Yet if we go back to the fountain head of these statements in the original dictum of Taney, C. J., we see at once that he had in mind the remedy, not the form of procedure, and hence that his remarks afford no ground for assuming that the words "at law and in equity" require a distinct procedure. Rather, those words were meant to give to Federal courts each of the two great classes of remedies of the Anglo-American legal system. Accordingly, many dicta have recognized that a substantial not a formal or procedural distinction is the one recognized. For instance, that is evidently what Curtis, J., had in mind when he spoke of "the equity law recognized by the Constitution and by acts of Congress." (Neves *v.* Scott, 13 How., 268, 272 (1851).)

So, also, in the following:

"The Constitution of the United States and the acts of Congress recognize and establish the distinction between law and equity. The remedies in the courts of the United States are at common law or in equity not according to the practice of State courts, but according to the principles of common law and equity as distinguished and defined in that country from which we derive our knowledge of these principles." (Davis, J., in Thompson *v.* Railroad Companies, 6 Wall., 134, 137 (1867).)

There remains one remark of an eminent judge sitting in a circuit court of appeals:

"But in the courts of the United States the distinction between actions at law and suits in equity and between legal and equitable defenses is carefully preserved because it is clearly recognized in the Constitution and laws of the United States." (Van Devanter, J., in Anglo American Land Co. *v.* Lombard (C. C. A.), 132 Fed., 721, 731 (1904).)

It is submitted that this means that the distinction between the remedies and the substance of the defenses is recognized by the Constitution and the distinction between the modes of procedure is established by the statutes.

In the requirement of the seventh amendment, that the right of trial by jury shall be preserved, we find a more serious matter. That this is the true basis of separate procedure at law and in equity has been recognized by many judges:

"The Constitution in its seventh amendment declares that 'in suits at common law, where the value in controversy shall exceed $20 the right of trial by jury shall be preserved.' In the Federal courts this right can not be dispensed with except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim properly cognizable at law of a demand for equitable relief in aid of the legal action or during its pendency. Such aid in the Federal courts must be sought in separate proceedings, to the end that the right to a trial by jury in the legal action may be preserved intact." (Field, J., in Scott *v.* Neely, 140 U. S., 106, 109 (1890).)

This evidently does not mean that the learned justice thought such a blending might not be provided for, if it did not impair the right to jury trial of legal issues. No such blending was permissible under the existing practice, and the reason is pointed out, namely, to preserve the right to jury trial. If, therefore, that right can be preserved, such a blending of legal and equitable issues in one cause might be established by proper authority. That this is so the Supreme Court of the United States has

made clear abundantly in passing upon legislation in Territories where statutes had done this very thing:

"The question is whether this act of the Territorial legislature in substance impairs the right of trial by jury. The seventh amendment indeed does not attempt to regulate matters of pleading or practice, or to determine in what way issues shall be framed by which questions of fact are to be submitted to a jury. Its aim is not to preserve mere matters of form and procedure, but substance of right. This requires that questions of fact in common-law actions shall be settled by a jury and that the court shall not assume directly or indirectly to take from the jury or to itself this prerogative. So long as this substance of right is preserved the procedure by which this result shall be reached is wholly within the discretion of the legislature, and the courts may not set aside any legislative provision in this respect because the form of action—the mere manner in which questions are submitted—is different from that which obtained at the common law." (Brewer, J., in Walker *v.* Railroad, 165 U. S., 593, 596 (1896).)

"As in Oklahoma [then a Territory], the distinction between actions at law and suits in equity is abolished—each action being called a civil action, whatever the nature of the relief asked * * * we perceive no reason why the case may not proceed in the trial court under the pleadings as they have been framed, with the right of the defendant to a trial by jury of all issues which, according to the recognized distinctions between actions at common law and suits in equity, are determinable in that mode." (Harlan, J., in Black *v.* Jackson, 177 U. S., 349,364 (1899).)

In that case the suit was in form one for a mandatory injunction. The court held that the seventh amendment did not require that the cause be brought anew as an action of ejectment, but that a jury trial of the legal issue as to possession would suffice.

This construction of the effect of the seventh amendment upon procedure at law and in equity, which must commend itself to everyone's good sense, is borne out moreover by what the court, speaking through Matthews, J., said in Ex parte Boyd (105 U. S. 647, 656, 1881):

"And the remaining question, therefore, becomes not so much whether Congress may, by appropriate legislation, transmute an equitable into a legal procedure, as whether it can in any wise change the rules of pleading and procedure as to courts, either of law or equity, in force in England at the time of the adoption of the Constitution, or whether by the adoption of that instrument all progress in the modes of enforcing rights, both at law and in equity, was arrested and their forms forever fixed. To state the question is to answer it."

It would seem, therefore, that:

(1) The Constitution gives the courts both legal and equitable jurisdiction; that is, the power to give both legal and equitable remedies, so that neither may be taken away by legislation.

(2) The Constitution preserves a right to a jury trial of legal issues triable only in an action at law under the common law, which can not be taken away, though it may be waived by the party entitled.

(3) If the remedies and the right so secured are not taken away or impaired, the mere manner in which the remedy shall be sought and the issue to be tried shall be presented is subject to legislative control.

(4) Hence, if anything, legislation only requires the present complete and absolute separation of law and equity in Federal procedure.

The second question may well be, How far may rules of court achieve the desired reforms and how far must they be achieved by legislation? As has been seen, the judiciary act of 1789, chapter 20, section 16, recognized the substantive distinction. But section 19 of the same act recognized, or at least assumed, a procedural distinction. Section 21 of that act and section 36 of the act of May 8, 1792 (1 Stat. L., 276), do the same. Since that time the distinction has been assumed in all subsequent legislation. Whether it is required thereby is not so clear. But the Federal courts have said that it is so emphatically so many times that resort to legislation may be the better course. There is good precedent, however, for allowing amendment from law to equity and vice versa, without express legislation, in the decision of Chief Justice Doe, of New Hampshire, in Metcalf *v.* Gilmore (59 N. H., 417, 433). In that cause the court held that the fact that the statute of jeofails allowed amendments at law and that amendments were always allowed in equity, coupled with the union of legal and equitable powers in one court, was enough to justify such amendments. Doe, C. J., said:

"Against an amendment based on the existing unity of jurisdiction it might be asserted that nothing can be done in court without a precedent, and that there is no precedent for such an amendment. But the unity of jurisdiction authorizes such an amendment as could have been made if the unity had been coeval with the common law. In a writ of entry on a mortgage it is found that the mortgage should be reformed. If law and equity had not been disjoined in England (as by the true principle of the com-

mon law they could not be) another suit with new process and new notice, for the reformation of the mortgage, would be no more necessary than a new suit to amend a town clerk's record or an officer's return, a reformation of which becomes necessary and is made during the trial. By fair implication the legislative act uniting the disjointed function prescribes whatever new proceedings are requisite for giving due effect to the union."

In some ways the Federal courts are much better situated to allow this desirable practice without legislation than was the Supreme Court of New Hampshire. In the Federal courts the practice at law by statute conforms to the State practice, which almost everywhere allows amendment from law to equity or vice versa. The practice in equity by statute is subject to regulation by rules of court. With full legal and equitable jurisdiction in all the Federal courts, it would seem that, unless the long line of dicta above quoted afford an insuperable obstacle, the power to make equity rules might well be invoked and obviate the interference of Congress. Moreover, there is good Federal precedent for such amendment without even a Federal equity rule. (Schurmeyer *v.* Life Ins. Co., 171 Fed., 1.)

Thirdly, we must ask, What reforms in the relation of law and equity in Federal procedure are desirable? It is submitted that three are desirable at once: (1) Power of amendment from law to equity and vice versa, (2) power to allow equitable defenses and equitable replications at law, (3) power to grant ancillary equitable relief in pending legal proceedings without requiring an independent suit with new process.

The first of these raises no questions other than those already discussed. Its desirability would seem beyond argument. It exists not only in the 27 code jurisdictions but also in the more advanced common-law jurisdictions. As has been seen, in New Hampshire it exists by judicial decision as a corollary of the granting of legal and equitable jurisdiction to one set of courts. Noteworthy statutes giving the same power, where legal and equitable procedure are kept distinct, are: Massuchusetts, Revised Laws, chapter 173, section 52; Illinois, Laws of 1907, page 435, section 40. In this respect practice in the Federal courts is far behind that in the State courts.

The second proposed reform involves three items: (*a*) Allowing equitable defenses at law, (*b*) allowing equitable cross demands in legal proceedings, where to make one's defense he must have affirmative equitable relief, such as reformation, cancellation, or specific performance; (*c*) allowing equitable replications at law, as, for instance, where a release under seal is set up as a defense and the plaintiff desires to avoid it on the ground that it was obtained by fraud. That this is not permitted in the Federal courts see Hill *v.* Northern Pac. R. Co. (C. C. A.) (113 Fed., 914). All of these powers are possessed by the majority of our State courts, and their desirability need not be argued. The sole difficulty lies in the necessity of carefully preserving the constitutional right to jury trial of legal issues. This has not proved a serious obstacle in the 27 code jurisdictions, though the legislative solutions thereof have not always been happy. Three classes of cases have arisen under codes and practice acts: (i) Pure equitable defenses, used defensively only. Here many jurisdictions submit the facts to a jury, as the party who interposes the defense at law may not well complain thereof. But if the court itself passes on the facts on which such a defense is predicated and directs what legal effect shall be given to the facts so determined, according to what a court of equity would have done in a separate suit for that purpose, no constitutional right is impaired. (Marling *v.* Railroad Company, 67 Ia., 331.) (ii) Cross demands for equitable relief of an affirmative nature, which if granted will cut off or dispose of plaintiff's case, but if denied will leave his case yet to be tried on its purely legal issues, or some of them. Here the latter only are triable by jury as of constitutional right. Hence the court may try the claim for equitable relief, and then if any legal issues remain to be tried a jury trial may be had. (Fish *v.* Benson, 71 Cal., 428; Stono *v.* Weiler, 128 N. Y., 655.) (iii) In some cases a legal cross demand has been set up in a suit in equity. Here the party who so sets it up and asks that it be adjudicated in the equity cause has been held to have waived a right to jury trial. Yet the other party may not choose to waive such right. Then the question obviously ought to depend upon whether, as may sometimes be done, this legal issue can be used defensively in equity under the chancery practice. If so, obviously no jury trial may be had; if not, the right must be preserved. (Larkin *v.* Wilson, 28 Kans., 513; Davison *v.* Associates of the Jersey Co., 71 N. Y., 333.) Some of the codes have tried to formulate these rather obvious conclusions, to which the courts have come wherever legislation would allow them, by the use of general phrases, such as "actions for the recovery of money only," "legal issues," "equitable issues," and the like. Such formulas have made much difficulty, since questions have arisen as to how far they may have altered the preexisting rights as to mode of trial. On the whole, no better formula is to be found than that announced by Harlan, J., in Black *v.* Johnson (177 U. S., 349, 364), that a party must have as of right "a trial by jury of all issues which

according to the recognized distinctions between actions at common law and suit in equity are determinable in that mode."

Still another difficulty may be suggested here, namely, the different mode of review in the Federal courts of actions at law and suits in equity, respectively. It may be asked what is to be done where an action at law involving equitable defenses or an equitable replication must be reviewed—shall there be error as to the legal part and appeal as to the equitable part, which would produce great confusion? The question is not a new one. In many of the code States separate forms of review for law and equity were preserved till recently, and hence this very situation arose. The solution adopted was to look to the nature of the main proceeding, in the course of which equitable or legal claims had been interposed. It was stated thus by Maxwell, C. J.: "The rule seems to be that where the action is at law to review the action itself or a final order in any special proceeding therein, the proper practice is by petition in error; but where the action is in equity, the decree itself or any special proceeding in the action * * * may be reviewed on appeal." (Morse *v.* Engle, 26 Nebr., 247.) In like manner in Massachusetts, where certain equitable defenses may be made at law, an action at law in which such a defense is raised is reviewed by exceptions like any other action at law. (Page *v.* Higgins, 150 Mass., 27.)

There remains the matter of injunctions to preserve the status quo pending actions at law. It is a needless expense to require a separate suit with new process and pleadings for this purpose. But no statute is necessary here. The Supreme Court has power by equity rules to prescribe the forms of procedure for exercise of all equitable powers of the court. Surely it may provide that this power of granting an injunction auxiliary to a pending legal proceeding may be exercised upon petition and notice in the legal controversy itself. Indeed, it would seem arguable that it might by rule allow a plea or answer or replication in an action at law to serve the purpose of a bill and so, without legislation, provide for equitable defenses and equitable replications.

II.—*Mr. Shelton's resolution.*

If this resolution is taken literally, no one can have any objection to it. Certainly none of those who advocate reform of procedure or propose or have proposed that a court in deciding a controversy should or should not be permitted to consider anything not legally before it in pleadings, by way of judicial notice, in the form of a presumption, or in the form of legal evidence. What they urge is that when a cause is before the court in the form of legal evidence, the court should be empowered to act upon it and its decision should not be set aside, even if not exactly presented by pleadings, unless some injury has resulted from want of notice of the case or defense to be made. In other words, they urge that pleadings should have but two functions: (1) To furnish notice of the claims, defenses, or cross demands of the parties, (2) to make a record of what has been passed upon so as to furnish a basis for subsequent pleas of res judicata. This matter was fully argued in our report a year ago. We need not repeat the arguments then urged. It is enough to say that if the pleadings give due notice, they subserve every useful purpose of judicial presentation of a cause.

It is suspected, however, that the purpose of the resolution is to impose upon the committee a doctrine, which has been much urged, to the effect that a court ought not to be permitted to deal with a cause in any way unless and until a technical statement of a cause of action, including all the legal elements of case, is before it. It has been asserted somewhat dogmatically, (*a*) that this is a fundamental requirement of the judicial administration of justice, without which there can be no law, (*b*) that it has always obtained in all legal systems, (*c*) that without it constitutional government is impossible, since the courts would operate arbitrarily and despotically. As to the first, it may be enough to say that justice is very well administered to-day in many kinds of cases without anything of the sort—in magistrates' and justices' courts on indorsed writs or informal bills of particulars, in the trial of claims against the estates of deceased persons in many jurisdictions on informal claim bills, in the English courts and in the courts of Canada on informally indorsed writs or informal statements of claim, designed to afford notice. As to the second, it may be remarked that in all three periods of Roman procedure the plaintiff's case was stated in a manner which would be open to demurrer at common law, and that in modern German procedure after citation containing a mere notice the issues are settled by a process of tentative pleading and amendment between court and counsel in which common law demurrers would lie to nearly every pleading. As to the third, in view of the wide powers of interpretation and ascertainment of the law which our common law system confides to the courts, it seems puerile to tie the courts hand and foot with procedural details lest they act arbitrarily. But notice pleading affords no more scope for arbitrary action than a pleading which requires a case to be stated with all

its legal elements in common law form. The action of the court on the case made by the proofs is always open to review, and that is the real concern of the law and of society; any deprivation of a fair chance to meet the case so made is also perfectly open to review. Variance ceases to be a matter for technical sparring for advantage and becomes one of substantial rights, namely, Has the party who claims it had a fair opportunity to meet the case against him?

It has been urged that a court can not act until a case is fully and technically made in a pleading before it. Why not? Courts do so act in the cases above enumerated and in others set forth in the report last year with no untoward results. The truth is the requirement of a technically correct pleading to sustain a good case fully proved by legal evidence after a fair hearing is purely historical. It arises from the common law mode of review by writ of error at a time when the parchment judgment roll was the sole mode of setting forth what the tribunal had done. Unless a case was made by the pleadings to sustain the judgment rendered, the reviewing court had no means of knowing upon what the judgment proceeded. To-day, with better modes of review in vogue in almost all jurisdictions and with ample facilities for review of the actual case, to continue to review the pleadings and to require new trial of a good case because of a bad pleading, supposing all requirements of notice have been duly fulfilled, is an anachronism. The committee has no desire to see anything judicially considered that is not juridicially presented, but it does desire to see the modes of juridicial presentation in many of our jurisdictions much simplified.

ROSCOE POUND,
(For the subcommittee).

SCHEDULE F.

MEMORANDUM OF DISSENT OF MR. ALLEN.

I very heartily approve of all the recommendations of the report except schedule D. The decision rendered by the Court of Appeals of New York in the case you mention certainly presents an instance in which it would be highly desirable to have a review in the Supreme Court of the United States, and a uniform construction of the Constitution of the United States, but I hesitate at any extension of the jurisdiction of that overloaded court. I fear that the amendment proposed would add materially to the number of cases taken to that court, and that in a very large majority of them the inconvenience would outweigh the advantage. Great delay, expense, and inconvenience inevitably result from an appeal to the Supreme Court of the United States, and we ought to be exceedingly careful that we do not open the door wider than necessity requires.

STEPHEN H. ALLEN.

BRIEF FOR AMERICAN BAR ASSOCIATION IN SUPPORT OF BILL RELATING TO PROCEDURE OF UNITED STATES COURTS.

[S. 3750; H. R. 16461.]

This bill was drawn by a committee of the American Bar Association. It has been under consideration by that association for five years. At the meeting at Seattle in August, 1908, it was much discussed and received the almost unanimous support of a large and representative meeting of the association. The bill was presented to the Sixtieth Congress, was discussed fully before the Judiciary Committee, and was amended to meet the criticisms of some members of the committee. In its amended form it passed the House of Representatives unanimously February 6, 1911 (H. R. 31165). It was approved unanimously by the American Bar Association at its last meeting in Boston. The bill represents and was drawn and approved by three professional elements—the bench, the practicing lawyer, and the university.

I. So far as procedure in appellate courts is concerned, what we wish to accomplish is this: That in the consideration in an appellate court of a writ of error or appeal, judgment should be rendered upon the merits without permitting reversals for technical defects in the procedure below, and without presuming, as many courts now do, that if there has been a violation in some particular of some rule of law, that violation has been prejudicial to the result. The effect of the first section of the bill that is now before you is to enact that the presumption shall be that the decision below was right, and that if it was erroneous in some detail the error did not affect the result.

Perhaps no better argument can be stated for this proposition than a passage in the opinion of Mr. Justice Martin, of the Court of Appeals of New York. It expresses the great embarrassment that lawyers feel in the trial of important cases. In Lewis *v.* The Long Island Railroad Company (162 N. Y., 50, 67) the judge delivering the opinion of the court says:

"After carefully and studiously examining the great number of perplexing and difficult questions determined during the heat and excitement of a sharp and protracted trial, we can but admire and commend the scrupulous and intelligent care and ability evinced by the trial judge, and the almost unerring correctness of his rulings. When the number and variety of the questions raised are considered, we are surprised not that a single error was committed, but that there were not many more."

In other words, our procedure is such that it is impossible, even with a judge of "almost unerring correctness," to get a verdict on the trial of an intricate cause that will stand the test of an appeal. It needs no argument to show that such procedure needs revision. The State of New York within a few years created a commission to inquire into the causes of the law's delay. Several judges of the supreme court of that State were examined before the commission. Presiding Justice Hirschberg said, in the course of his examination:

"I think that one great difficulty is that our system is distinctively an appellate system, and it is based upon the fundamental idea that a trial and a decision are always wrong; the result of it is that people indulge in litigation because the opportunities are great; they are sure of two appeals, and until the final decision is made they are in no hazard. (Law's Delay Commission Report, p. 269.)

"I have always thought it was a fatal feature of our judiciary system * * * the idea that if a man tries a suit and loses, he can appeal on the assumption that that was wrong, instead of appealing on the assumption that it was right." (Ibid., p. 270.)

Mr. Justice Scott agrees with this view:

"Mr. Hayes. Have you any suggestion to make on appellate procedure?

"Judge Scott. You should change that rule of presumption; in the first place I think the appellant should have cast upon him the burden of establishing that there had been error below, and also of showing that that error had been prejudicial. None of us is so wise that he can try a long case without committing some error. In addition to that the appellate division should have the power of awarding judgment." (Ibid., p. 288.)

Mr. Justice (now Senator) O'Gorman says:

"One of the gravest faults with our present mode of trial is the ease and frequency with which judgments are reversed on technicalities which do not affect the merits of the case, and which at no stage of the case have affected the merits.

"We have a rule in our State that the commission of an error upon the trial of a cause by a trial justice is presumptively prejudicial to the appellant, and instead of the appellant being required to persuade an appellate court that he has suffered substantial wrong, the moment that he can place his finger on a technical error the burden is at once shifted, and the respondent required to persuade the court that there was no harm following that particular ruling. Now, we all know, and there are very few who seek to vindicate the practice, that very many cases are sent back from the appellate division upon alleged errors which have never affected the merits of the case. (Ibid., pp. 316-317.)

"At the present time nearly every defeated party is willing to take a chance of securing a reversal on appeal. They have every encouragement." (Ibid., p. 319.)

In opposition to all the rules of technicality, which work such injustice and cause such delay, we urge that laid down by Chief Justice Marshall in Church *v.* Hubbart (2 Cranch, 232):

"It is desirable to terminate every cause upon its real merits if those merits are fairly before the court, and to put an end to litigation where it is in the power of the court to do so."

The amendment proposed is the equivalent to that already adopted by the Legislature of New York in criminal cases. We quote from the opinion of the court of appeals in People *v.* Strollo (191 N. Y., 42).

At pages 61, 67, the court said:

"Under the statute our powers and duties in capital cases are strictly correlative. While we have power to reverse in the interests of justice, even where no exceptions are taken, it is also our duty to disregard errors which, although excepted to, do not affect the substantial right of a defendant. Guided by this rule, we feel constrained to hold that none of the general criticisms referred to under this head present sufficient grounds for reversal. * * *

"These various elements of the question, considered in connection with the functions and powers of this court, bring us face to face with the situation that is apparently paradoxical but actually logical. That is to say, we might have a condition in which we would be compelled, in a civil case, to grant a new trial for a loss of original documentary evidence, although under similar conditions, in a case involving human life and liberty, we may be bound to deny such relief. And why should this seemingly anomalous difference exist? Because this is a court of statutory origin and vested with none but statutory jurisdiction. Thus it happens that in civil cases our powers are limited to the review of errors which are raised and presented by exceptions, while in criminal cases we are not only empowered but commanded to give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties. (Code Crim. Proc., sec. 542.) This power of review on criminal appeals is still further broadened in capital cases by the legislative direction that "when the judgment is of death, if it be satisfied that the verdict was against the weight of evidence or against law, or that justice requires a new trial, whether any exceptions shall have been taken or not in the court below." (Code Crim. Proc., sec. 527.)

Similar legislation to that now proposed has been adopted in Illinois, Kansas, Ohio, and Wisconsin, and by constitutional amendment in California.

In dealing with this important subject, we ask you to put yourselves in the attitude of a lawyer who has a righteous cause, and who naturally desires to bring it to trial and obtain final judgment for his client as soon as possible. Is not this the attitude you always want to occupy? Doubtless, we are sometimes called upon to defend a client who has no defense upon the merits. As long as the law gives the right to interpose a technical defense and prolong the litigation, the lawyer is blamed by many if he does not exert his skill to the uttermost for that purpose. When we look at our profession from the standpoint of the Commonwealth; when we consider that we are not only attorneys for a client, but officers of the court, and charged with an important part in the administration of justice, we must admit that we occupy a humiliating position whenever we undertake to defeat it. It may be a lawyer's duty to occupy this position under the existing system. All the more, therefore, is it our duty as citizens to endeavor to reform the system, so that these means of procrastination shall no longer be available.

The objection that is commonly taken to this doctrine, so far as it applies to the review of cases that have been tried before a jury, is that expressed in a letter that we have received from one of the Federal judges, to whom we submitted the proposed bill. He puts it thus:

"If an appellate court either affirms or reverses because of its own opinion as to the merits, it substitutes a trial by judges for a trial by jury."

Our reply to this is that it misconceives the scope of the proposed reform. So far from depriving the verdict of the jury of its value, it tends to establish the verdict. Long experience in the trial of cases before a jury, and conversation with intelligent jurors of our acquaintance, has convinced us that jurors pay much less attention to fine points of evidence or to nice distinctions in the charge than judges generally seem to suppose. In more than half the cases where judgments have been reversed on questions of evidence the ruling in the court below did not affect the verdict in the slightest degree. This being the case, it is unjust that the parties should be put to the expense and delay of a new trial.

Therefore, as practicing lawyers, it is clear to us that the presumption of the appellate court should be that a ruling on the evidence, which it deems erroneous, did not affect the result. It should be for the defeated party to satisfy the appellate court that the ruling was actually prejudicial to him upon the merits.

While we can not say that any of the Federal courts has ever sinned as much as some of the State courts, yet we would put upon the statute book a uniform rule for all the circuits, which will embody the rule that prevails in some of them, and which will make it impossible for some of the decisions to be made that the former chairman of this committee, Mr. Lehmann, of St. Louis, adverts to in an address he has recently delivered. We call attention to one, because it seems to us, on the whole, the most flagrant. Yet, under the existing system in some States, it is not only possible, but it has actually occurred. That was an indictment for rape. The proof was clear and the man was convicted, but a writ of error was sued out and the lawyer discovered this defect in the indictment: The constitution of Missouri requires that the indictment should conclude "against the peace and dignity of the State," but in engrossing the indictment the article "the" was omitted before the word "State." The Supreme Court of Missouri held, in State *v.* Campbell (210 Mo., 202), that the omission was fatal, although they said (p. 234): "The testimony as disclosed by the record in this case was amply sufficient to warrant the court in submitting the question to the jury."

They reversed the judgment of conviction. The indictment being held void, of necessity the guilty man would go free unless a new indictment should be found and the case tried again.

There are other cases that might be cited where courts on appeal, particularly in criminal cases, have stretched the rule of error to the furthest limit. It is not in the interest of justice that this should be permitted. The maxim of the common law was that the judge himself is condemned when he acquits the guilty; but we have come in many jurisdictions to the very opposite of that, dependent, we may say, a little upon the character and temper of the judge who happens to sit on the case. Some judges are more technical than others and attach more importance to points like this than others do. That ought not to be the condition of the law. There ought to be a general rule formulated by Congress which shall control in all the circuits of the United States, so as to make these reversals for purely technical defects impossible in any of the Federal courts.

Society has an interest in the punishment of the guilty. Under our system the accused has every chance in the first instance. The judge must charge that he can only be convicted if the jury find him guilty beyond a reasonable doubt. His counsel will probably argue that it is better that ninety-nine guilty men should escape than that one innocent man should be convicted. If, after all that, the jury find the accused guilty, there is a strong presumption of his guilt; and it ought not to be possible for a person in that situation to be allowed to take advantage of such technical errors, which do not affect the merits, and which have nothing to do with the question of his guilt or innocence. We do not always get the most skillful prosecuting attorneys, and under the present rule, as it is often administered, there is required of them almost preternatural skill and foresight in order to guard against questions and objections taken in this way.

II. The second clause of the bill was drawn so as to provide a method by which a verdict on questions of fact may be taken on the trial, reserving questions of law for more deliberate consideration, either by the trial judge, or in the appellate court. It authorizes the court to direct judgment to be entered upon the verdict or upon the point reserved, if conclusive, as its judgment upon such point reserved may require.

This amendment gives additional value to the trial by jury. It will prevent the delay, expense, and consequent injustice caused by new trials upon every issue, when the judgment of the appellate court differs from that of the trial court upon some point of law.

To quote from the opinion of the New York Court of Appeals in a recent case:

"It frequently happens that cases appear and reappear in this court, after three or four trials, where the plaintiff on every trial has changed his testimony, in order to meet the varying fortunes of the case upon appeal."

This is a direct encouragement of fraud and perjury. (Walters *v.* Syracuse Rapid Transit R. Co., 178 N. Y., 50.)

On the other hand, a just cause may be lost on the second trial because of the death of witnesses, or their departure to parts unknown.[1]

The practice we propose is the common-law practice. It prevails in England to-day, under the judicature act. In that country final judgment is rendered on appeal in 90 per cent of the cases in which the judgment below is reversed; and in only 10 per cent of the reversals is a new trial ordered.

As a matter of fact, the existing procedure in criminal law was framed at a time when it was really needed to protect the criminal, especially from political prosecutions. This is no longer necessary. The criminal is well protected. He must be first indicted by a grand jury of at least 13 men. They say, in finding the true bill, that the man is guilty of the offense. As Sir James Stephen points out in one of his books on criminal law, it is a remarkable thing to say that a man who by 13 of his neighbors has been declared guilty shall start off on his trial with a presumption of innocence. Still he does. The courts tell the jury all the way through, "This man starts and carries through the trial with him this presumption of innocence." Yet at least 13 of his neighbors have already said that he is probably guilty of the crime of which he is accused. The presumption of innocence must be rebutted by sufficient evidence before the jury beyond a reasonable doubt, whereas in a civil case merely a preponderance of the evidence is sufficient. Then, when the prosecutor overcomes all those advantages of the accused, there must be a unanimous verdict. One man can hold up the whole case or compel a mistrial. Again, under the present procedure, if there has been any technical error, even though it does not affect the merits, there must be a new trial. Every rule possible is made to protect the criminal.

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[1] A notable instance of the delays under the present system is the Hillmon case (145 U. S., 285; 188 U. S., 208). Second judgment of reversal was 23 years after trial begun. In Springer *v.* Westcott (166 N. Y., 117) there were four appeals. The recovery was $900—for the contents of a trunk.

American courts are far more technical than the English. They have amended their old law. We have adhered to it. They know that the intricacy and technicality of criminal procedure are obsolete, and no longer fitted for civilization. We pride ourselves on our business capacity and our way of doing things in a common-sense way, and yet we cling to these old technicalities that the Englishman dropped 30 years ago. They pass over little things that we get a new trial for; they decide cases upon the merits more expeditiously and more in consonance with justice than we do.

The American Bar Association, speaking for the bar of every State, urges upon Congress to reform these abuses and redeem the promise of Magna Charta that justice shall be denied or delayed to no man, and that the administration of justice shall not be so cumbrous, dilatory, and consequently expensive that it shall be obtainable only by the rich.

In the President's message, sent to Congress December 21, 1911, we find the following recommendation (p. 16):

"The American Bar Association has recommended to Congress several bills expediting procedure, one of which has already passed the House unanimously, February 6, 1911. This directs that no judgment should be set aside or reversed or new trial granted, unless it appears to the court, after an examination of the entire cause, that the error complained of has injuriously affected the substantial rights of the parties, and also provides for the submission of issues of fact to a jury, reserving questions of law for subsequent argument and decision. I hope this bill will pass the Senate and become law, for it will simplify the procedure at law."

The President's experience as a lawyer and a judge gives especial weight to this recommendation. We submit that it should receive careful consideration.

We conclude with a quotation from the great Italian statesman, Cavour, which seems to us timely:

"I am not an alarmist; nevertheless, without being one, I think we can see at least the possibility, if not the probability, of stormy times. Well, gentlemen, if you wish to take precautions against these stormy times, do you know the best way? It is to push reforms in quiet times, to reform abuses when these are not forced upon you by the extremists."

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RUSSELL WHITMAN, *Illinois.*
R. E. L. SANER, *Texas.*
(For American Bar Association.)

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